REPORTS

OF

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF LOUISIANA.

WESTERN DISTRICT.

ALEXANDRIA, OCTOBER TERM, 1841.

GAS LIGHT & BANKING CO., *vs.* NUTTALL.

APPEAL FROM THE COURT OF THE SEVENTH DISTRICT, FOR THE PARISH OF CATAHOULA, THE JUDGE OF THE SIXTH PRESIDING.

Two witnesses are required, not only to the protest, but to the record of the certificate of the notary, under the act of 1821; and this act is not superseded by that of 1827; both of which require the *certificate* of protest to be attested by two witnesses, to be *evidence* of notice.

This is an action against the endorser of two promissory notes, amounting to $2,325, discounted in Bank. The defendant pleaded a general denial. There was judgment for the plaintiffs, and the defendant appealed.

On the trial, the plaintiff offered in evidence the protests of the notes sued on to prove demand, to the intoduction of which, defendant's counsel objected, on the ground that the two subscribing witnesses in whose presence the protests have been made, did not sign the protests, and that these acts are

WESTERN DIS. *October*, 1841.

GAS LIGHT AND BANKING CO., *vs.* NUTTALL.

not such as are required by law to make proof of themselves, of the facts contained in them. The objection was overruled and the defendant's counsel excepted.

The plaintiffs then offered the testimony of witnesses to prove the death, acts as notary and other conduct of the notary who made the protest; which was objected to on the grounds that it was not authorized by the allegations in the petition: Also, the plaintiffs offered in evidence the certificates appended to the protests, signed by the notary, to prove notice to the endorsers; to the introduction of which, defendant objected, on the grounds, that they were not in accordance with the statute: that it did not appear the notary kept any book in which these entries were made; that they are not signed by two witnesses, and do not appear to be in the hand-writing of the notary or signed by him: but the court overruled the objections and received the certificates.

The defendant took his bill of exceptions.

The protest was signed in the presence of two witnesses, but the certificate of the notice to the endorser was signed by the notary alone.

Mayo & Purvis, for the plaintiffs and appellees, urged the affirmance of the judgment.

Garrett, for the defendant, insisted that the certificate of the notary was wholly insufficient as evidence of notice to the endorser. The act of 1821 is express that the certificate must be recorded and attested by two witnesses.

Bullard, J. delivered the opinion of the court.

This is an action against the endorser of two promissory notes. The only question which the case presents, relates to the sufficiency of the evidence of notice of protest.

The plaintiffs gave in evidence a protest made by a notary public which appears to be regular; it is attested by two witnesses, and bears the notary's seal. On the same sheet is a certificate of the notary under his seal, bearing the same date

with the protest, but not attested by any witness, and not purporting ever to have been recorded, in which the notary states the manner in which the endorsers were notified of the demand made upon the drawer and his failure to pay. The written notice which he certifies was forwarded by the first mail, addressed to the defendant at his domicil in Sicily Island, was sufficient if the certificate of the notary without witnesses furnish sufficient legal proof of the fact.

Under the act of 1821, concerning protest of Bills of Exchange and Promissory Notes, and notices, &c., such certificate would be clearly insufficient. That act required the notaries to keep a separate book in which they shall transcribe and record by order of dates, all the protests made by them, *with mention* of the notices which they have given of the same to the drawers or endorsers, together *with the names* of the said drawers and endorsers, the date of said notices, and the manner in which they were served or forwarded to the said drawers or endorsers, which declaration duly recorded under the signature of the said notary public or parish judge, and two witnesses, shall be considered and received as legal proof of said notices.

Under this statute it was held at an early period, that not only two witnesses were required to the protest itself, but to the record of the certificate.—5 Martin N. S. 511.

Two witnesses are required, not only to the protest, but to the record of the certificate of the notary, under the act of 1821; and this act is not superseded by that of 1827; both of which require the *certificate* of protest to be attested by two witnesses, to be *evidence* of notice.

The act of 1827, amendatory of the one above mentioned, under which it is contended this certificate is valid and sufficient, enacts that notaries are authorized in their protests to make mention of the demand made upon the drawers, acceptor, or person on whom such order or bill of exchange is drawn or given, and of the manner and circumstances of such demand, "and by certificate *added to such protest* to state the manner in which any notices of protest to drawers and endorsers, &c., were served or forwarded; and whenever they shall have so done, *a certified copy of such protest and certificate shall be evidence of all the matters therein stated.*" Acts of 1827, page 76.

WESTERN DIS. *October*, 1841.

GAS LIGHT AND BANKING CO., vs. NUTTALL.

This is the first occasion within our knowledge upon which a simple certificate of the notary without the attestation of witnesses and never recorded, has been presented as evidence of notice to endorsers under the statute. Its sufficiency depends upon the question, whether the act of 1827 repeals that of 1821, in this respect. In the case of Whittemore vs. Leak and Howell; 14 La. Rep. 394; the question was raised by the counsel, but we held that in as much as the copy of the certificate of notice in that case exhibited the names of two attesting witnesses, we would presume they had signed the original, and that consequently it was not necessary to decide how far the statute of 1821 had been repealed or modified by that of 1827.

There is clearly no express repeal. The 4th section declares that all acts and parts of acts *contrary to the* purport of this act be, and the same are hereby repealed. This repealing clause does no more than announce the well known principle of law, that when the provisions of two statutes are contrary to, or irreconcilable with each other, the prior is abrogated by the posterior one. May not these two statutes well stand together? and are we not bound to regard the provisions of the latter as cumulative? If we were to say that the attestation of two witnesses may be dispensed with as to the certificate of notices, the same reason applies to dispense with them in the body of the protest as to demand of the acceptor or maker. The act of 1827 makes no mention of witnesses in either case. But it speaks of a protest, and a protest according to the existing law necessarily applies the presence of witnesses as indispensable. A certificate *added to a protest* is not necessarily a separate act, it may be and by the practice of some notaries, frequently is a continuation of the same act of protest so that the same witnesses may attest both. It is true that no law requires the notices to be given simultaneously with the protest, and the certificate of notices is necessarily subsequent in point of time, but there are obvious reasons for requiring the attestation of witnesses to the certificate, even if the re-

cording be dispensed with, as a check upon the notary and to prevent him from adding a certificate afterwards and antedating it. It appears to us that the two statutes must be taken and construed as laws in *pari materiâ;* and we cannot suppose that the legislature intended to give to the simple naked certificate of a notary the effect of full proof, and to dispense not only with the recording by order of dates of the protests of notaries, but at the same time with the attestation of witnesses to the certificate. Such a practice would leave parties at the mercy of a notary, who cannot be permitted as a witness to contradict his own act. We are confirmed in this view of the case, by what we believe to be the general practice under that statute since its enactment, and in matters of commercial usage; it is dangerous to innovate too lightly until the legislature shall declare that such certificates *shall suffice*, we cannot sanction a deviation from what we consider a legal form.

The original protest and certificate were given in evidence and accompany the transcript. It is shown, that the certificate is not in the handwriting of the notary, though signed by him; and that after his death, the parish judge, in making an inventory of his estate, found no book of record of protests or certificates of notices; and that he was careless in his mode of doing business as a notary. It appears, that he kept no memorandum of such transactions, except very short and vague ones, for the purpose of getting paid for his protests. None of the cases cited by the counsel for the appellee, appear to us to sustain him. In the case of Bullard vs. Wilson, 5 Martin, N. S., 196, the notary was sworn as a witness. The memorandum made by him was *per se* a mere nullity, and was used only to refresh the memory of the witnesses. Notice must be shown either by testimony under oath, or by an official certificate in strict compliance with legal forms.

It is therefore adjudged and decreed, that the judgment of the District Court be avoided and reversed, and that ours be for the defendant as in the case of a non-suit, with costs in both courts.

WESTERN DIS. October, 1841.

GAS BANK vs. PHELPS.

GAS BANK vs. PHELPS.

APPEAL FROM THE COURT OF THE SEVENTH DISTRICT FOR THE PARISH OF CATAHOULA, THE JUDGE OF THE SEVENTH PRESIDING.

The certificate of the notary must be recorded and attested by two witnesses, to be admissible as evidence of notice.

This is an action against the maker and endorser of a promissory note.

The maker made no defence. The defendant, Phelps, pleaded the want of legal notice as endorser, &c. The notary's certificate was not recorded and not attested by two witnesses. The notary being dead, the certificate was the only evidence of notice. It was objected to as insufficient, but admitted, and the defendant excepted.

There was judgment for the plaintiffs, and the endorser alone appealed.

Mayo & Purvis, for the plaintiffs.

Phelps, in propria persona.

Bullard, J. delivered the opinion of the court.

The endorser of a promissory note is appellant from a judgment rendered against him as such. He specially denied notice of a demand of the drawer, and his refusal or neglect to pay. And the only evidence offered by the plaintiffs, to prove such notice was the certificate of a notary public, without witnesses. The case cannot be distinguished from that of the same plaintiffs vs. Nuttall, just decided; *ante* 447.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and that ours be for the defendant as in the case of a non-suit, with costs in both courts.

ROBERTS & CRAIN *vs.* JENKINS.

APPEAL FROM THE COURT OF THE TENTH DISTRICT, FOR THE PARISH OF CADDO, JUDGE CAMPBELL PRESIDING.

In a suit on *a joint note*, where it is shown the defendant signed as surety for the other maker; although the obligation be *joint only in its form*, yet the surety is bound for the whole debt, or is liable *in solido*.

This is an action on the following note against one of the makers only; McLeod, the other, being dead.

"*Shreveport, July* 1*st*, 1839."

"$2,459.—One day after date, *we promise* to pay to the order of James G. Jones, the sum of twenty-four hundred and fifty-nine dollars, for value received."

"J. C. McLeod."

"W. Jenkins."

The defendant Jenkins alone is sued. The plaintiffs allege, he is surety for McLeod, and consequently bound for the whole debt. They propounded interrogatories touching the suretyship, which were neglected to be answered, and taken for confessed.

The defendant admitted his signature and pleaded the general issue; and denied specially, that the plaintiffs were the proper and legal owners of the note in suit.

The district judge was of opinion, from the tenor of the obligation, that it was *joint only*, and that the defendant was liable for only one half. Judgment was rendered accordingly, and the plaintiffs appealed.

Crain, for the plaintiffs and appellants.

Gilbert, for the defendant.

Martin, J. delivered the opinion of the court.

The plaintiffs are appellants from a judgment, in which they have recovered one half only of the amount of the note, on which the suit is brought. It was signed by another person

WESTERN DIS. *October*, 1841.

ROBERTS & CRAIN *vs.* JENKINS.

and the defendant, and is therefore on its face a joint note, or obligation.

The plaintiffs and appellants allege, that the defendant signed the note as surety. To establish this, they propounded an interrogatory, which the defendant failed to answer, and it must therefore be taken *pro confesso*. Although on the face of the note, judgment should have been given for the defendant's *virile* part only, the circumstance of his having entered into a contract of suretyship, entitles the plaintiffs to a judgment against him as a surety, notwithstanding the instrument, which is the evidence of the debt, represents him as a joint debtor, and as such liable for only half of the debt. The defendant, by failing to answer the interrogatories, has admitted that he is a surety. He has not said, that he is surety only for a part; and we must consider him as a surety for the whole.

The District Court, in our opinion, erred in restricting its judgment to one-half of the amount of the note.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed: and proceeding to give such judgment as in our opinion ought to have been rendered in the court below: It is ordered, adjudged and decreed, that the plaintiffs do recover of the defendant two thousand four hundred and fifty-nine dollars, and eleven cents, with interest thereon at the rate of 5 per cent. per annum, from the 30th November, 1840, until paid; and costs in both courts.

BRANDER ET AL. *vs.* GARRETT ET AL.

APPEAL FROM THE COURT OF THE SEVENTH DISTRICT, FOR THE PARISH OF OUACHITA, THE JUDGE OF THE SIXTH PRESIDING.

In an action on *a joint obligation*, when it is shown, two of the parties signed as sureties of the third, any payments made by the principal debtor, will be imputed and go to the extinguishment of the debt, and judgment given for the balance, against the principal and sureties *in solido*.

This is an action on a promissory note against the makers, who all sign as joint obligors.

The defendants severed in their answers. Garrett admitted the note was given for his debt and sole benefit, and set up a payment of about $1323 for the price of certain cotton, sent by him to the plaintiffs.

The two other defendants pleaded the general issue, and averred the note and debt were paid and extinguished by the principal debtor and their co-defendant. They aver, they are only sureties of Garrett, and plead the benefit of discussion.

It was fully shown, the two last defendants (Pinnell & Peck) were the sureties of Garrett, and that he had made payments.

The district judge however considered all the parties as joint obligors, and each only bound for his share. That Garrett, the principal debtor, (and who had absconded,) was entitled to the credit of $1323, which extinguished his share of $833 33, with a reserve over of $490. Judgment was given in his favor and against the two sureties each for $833 33. They alone have appealed.

McGuire, for the plaintiffs.

Copley, Downs & Garrett, contra.

Bullard, J. delivered the opinion of the court.

This is an action against Garrett, Pinnell & Peck upon a promissory note, in the form of a joint obligation, for $2500. The two latter aver in their answer, that they were in point of

WESTERN DIS. October, 1841.

BRANDER ET AL. vs. GARRETT ET AL.

fact sureties to Garrett. But they were condemned as joint obligors, and they have appealed. Garrett is not a party to the appeal; but it becomes necessary to go into his defence, as it appeared by answers of the plaintiffs to interrogatories, that the whole debt was Garrett's, and that the co-obligors were his sureties. It follows, that any defence, of which Garrett could avail himself, may be used by the sureties.

Garrett answered by averring also, that he was principal debtor, but that he had had subsequently a settlement with the plaintiffs' agent, and made payments, for which credits were not given. From the answers of the plaintiffs to interrogatories and other evidence in the record, it appears to us, the district judge justly concluded, that at the time the note fell due, Garrett was entitled to a credit of $1323 99 upon the note sued on. But it appears equally clear, that the appellants were sureties for Garrett, and yet each of them is condemned for his third of the note; while the principal debtor has judgment extinguishing his part of the note, to wit: $833 33, and reserving a balance in his favor for $490 66, which two sums together amount to the credit of $1323 99. If the principal was entitled to the credit, so were the sureties, notwithstanding the form of the obligation. The mere form should be disregarded and the rights of the parties adjusted according to its real substance and nature, as we recently held in the case of Crain & Roberts vs. Jenkins, decided at this term; *ante* 453. In this respect, we think, the judge erred, and that the defendants, who have not claimed division, should have been condemned *in solido* to pay the balance due upon the note, $1176 01.

The judgment of the District Court, so far as it relates to the defendants, James Pinnell and Alexander D. Peck, is therefore avoided and reversed; and proceeding to render such judgment as should in our opinion have been given below: It is further ordered and decreed, that the plaintiffs recover of each of said defendants *in solido*, as sureties of Garrett, the sum of *eleven hundred and seventy-six dollars, and one cent*, with interest at five per cent. from judicial demand, and costs

as to them in the court below, and that the plaintiffs pay the costs of this appeal.

HUIE vs. BRAZEALE.

APPEAL FROM THE COURT OF THE SIXTH DISTRICT FOR THE PARISH OF NATCHITOCHES, THE JUDGE THEREOF PRESIDING.

Where the last day of grace for the payment of a note or bill is a Sunday or a day of rest, the protest is properly made on the preceding day.

Personal notice of protest may be made on the endorser at any place, however distant from his domicil; and personal notice dispenses with constructive notice, by sending it through the post office.

This is an action against the endorser of a promissory note, dated the 15th February, 1837, payable twelve months after date, to the order of the defendant, and by him and others endorsed. The note was made payable in New Orleans, and became due the 15th and 18th February, 1838; the last day being *Sunday*, it was protested on Saturday, the 17th, and notice of protest served personally on the defendant, in New Orleans, the following Monday. His domicil was in the parish of Natchitoches. The defendant pleaded the general issue; and the want of due and legal notice of protest.

There was judgment for the balance due on said note against the defendant, and the other parties to it, *in solido*, and he alone appealed.

Curry, for the plaintiff, and on the part of Mr. *Sherburne*, the original counsel, submitted the case on written points.

Roysden, contra.

WESTERN DIS. October, 1841.

RUTE vs. BRAZEALE.

Martin, J. delivered the opinion of the court.

The defendant Brazeale is appellant from a judgment against him and the other endorser of a promissory note, originally given by one B. F. Chapman, as the price of three slaves, which he purchased from the plaintiff for $4644. When the note became due, the last day of grace was on Sunday, the 18th February, 1838. The note was protested in New Orleans, where it was made payable on Saturday, the 17th February, 1838, and notice delivered to the appellant, who was the first endorser, on the Monday following, two days after protest. Before instituting this suit, the plaintiff took out an order of seizure and sale against the slaves on his mortgage, and they were sold on 12 months credit for the sum of $3160. This sale was made on the 6th of March, 1839, and the note and the ten per cent. interest accruing thereon, amounted to the sum of $5134 72, which after deducting the amount of the sale of the slaves, left a balance at that date of $1974 72, due on said note, which is the sum claimed in the present suit. Judgment is given for this sum, with 10 per cent. interest thereon, from the 6th March, 1839, until paid, against the endorsers.

The counsel for the defendant has urged, that the protest was illegally made on the 17th February, when the note became due on the 18th; and that the notice was improperly delivered to him personally in the city of New Orleans, while his residence is in the parish of Natchitoches.

Where the last day of grace for the payment of a note or bill is a Sunday or day of rest, the protest is properly made on the preceding day.

The 18th February, the last day of grace, being a Sunday, the protest was correctly made on Saturday, the 17th and preceding day. Acts of 1838, page 44, sec. 5.

Notice appears to have been served on the defendant personally. It is however urged, this is irregular; because the act of the 13th March, 1827, requires, that when the endorser does not reside in the place, where the protest was made, to put the notice in the nearest post office, addressed to him at his domicil or usual place of residence. This act makes mention of two modes of giving notice to the endorser; to wit: by service on

him, *personally*, or transmission through the post office. In directing the mode of transmission, the act refers only to cases, in which there is no personal service. In such cases transmission of notice through the post office would be nugatory. When the notice is served personally, the endorser has *positive* notice, and when it is transmitted to him through the post office, he has only constructive notice. It would be absurd to say, that after positive notice has been received, constructive notice is still to be given.

Personal notice of protest may be made on the endorser at any place, however distant from his domicil; and personal notice dispenses with constructive notice, by sending it through the post office.

It has lastly been contended, that the certificate of the notary is evidence only of the transmission of the notice by mail; and that personal service of notice must be sworn to by the notary or the person who makes it. The first section of the act cited, requires the notary to state in his certificate the manner in which notice is *served* or forwarded, and of this, the act makes the notary's certificate evidence. 1 *Moreau's Dig.*, 76.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

GAS BANK *vs.* DESHA.

APPEAL FROM THE COURT OF THE SEVENTH DISTRICT FOR THE PARISH OF CATAHOULA, THE JUDGE OF THE SIXTH PRESIDING.

Where the certificate expresses the name of the post office, to which notice to the endorser is sent, it is sufficient, without stating it is the *nearest* to his residence. A denial might put the adverse party on his proof, that it was the nearest.

The want of amicable demand cannot be pleaded, when the protest states, that demand was made of the maker of the note, and the endorser notified, that he would be looked to for payment.

Bankable interest is due on notes discounted in Bank, from the day of protest.

WESTERN DIS. *October*, 1841.

GAS BANK vs. DESHA.

This is an action against the endorser of a promissory note, for the balance due thereon of $625, and interest.

The defendant pleaded the general issue, and denied specially his liability as endorser, or that he was in any way indebted.

On the trial the note and protest were offered in evidence. The notary's certificate was objected to by defendant's counsel, because it did not purport to be taken from a book kept for that purpose, and because it did not state, that notice was sent to the endorser's nearest post office. These objections were all overruled and judgment for the plaintiffs. The defendant appealed.

Mayo, for the plaintiffs.

Garrett, contra.

Garland, *J.* delivered the opinion of the court.

The defendant is appellant from a judgment rendered against him as the endorser of a promissory note for $625, with interest thereon at the rate of seven per cent. per annum, from the 15th day of September, 1839.

He first contends there is no legal evidence of notice to him, "the only evidence being the certificate of the parish judge, which is not in accordance with the statute of 1821. The copy does not appear to have been taken from a book in which it was duly recorded under the signature of the notary and two witnesses." He relies on 1 Bullard & Curry's Dig., 41. The protest is signed by two witnesses, and the parish judge certifies it as "a true copy of the original extract in my office." The act of the 13th March, 1827, relative to the manner of giving notices to endorsers, seems to have escaped the attention of the counsel for the defendant. 1 Idem, 40–42. Under it the parish judge has acted, and we think has substantially complied with its provisions.

The next objection is, that it is not stated in the protest, that

the notice was directed to the post office nearest to the domicil or habitual residence of the defendant. The post offices, to which the notices were sent, are named in the certificate of the notary; the defendant has not denied in his answer, that the one for him was misdirected or that there was another post office nearer to him. Had he done so, the plaintiff would have been put on his guard as to the proof it was necessary to make, and might probably have been compelled to show the office, to which the notice was sent, was the nearest to the defendant. At any rate, the defendant might have discharged himself by showing, there was a post office nearer to him, than the one to which the notice was sent.

Where the certificate expresses the name of the post office, to which notice to the endorser is sent, it is sufficient, without stating it is the *nearest* to his residence. A denial might put the adverse party on his proof, that it was the nearest.

The defendant's plea of a want of an amicable demand will not avail him. The demand of payment on the drawer of the note and a notification to the defendant, that the holder looked to him for payment, is in our opinion a sufficient demand.

The want of amicable demand cannot be pleaded, when the protest states, that demand was made of the maker of the note, and the endorser notified, that he would be looked to for payment.

The Bank has a right to recover interest at seven per cent. per annum, from the day of the protest. The plaintiff is the holder of the note, which on its face shows it was made for the accommodation of the drawer. The inference, that it was discounted is irresistible. La. Code, art. 2895; Acts, 1835, p. 103, sec. 23.

Bankable interest is due on notes discounted in Bank, from the day of protest.

In the plaintiffs' petition it is admitted, the sum of $158 was paid on the 11th of October, 1839, yet judgment is entered for the whole amount of the note. This is an error we must correct. At the foot of the protest it is stated, that the sum of $158 16 has been paid on the note. The defendant contends, he is entitled to credit for both sums. We have no doubt the sum stated in the petition is the same noted on the protest, and we shall only allow a credit for the latter sum.

The judgment of the District Court is therefore annulled, avoided and reversed; and this court proceeding to give such judgment as in our opinion ought to have been rendered in the court below, do further order, adjudge and decree, that the plaintiffs do recover of and have judgment against the defendant for the sum of four hundred and sixty-nine dollars and

WESTERN DIS. *October*, 1841.

BROWN vs. GUNNING'S CURATRIX ET AL.

ninety-six cents, with interest thereon at the rate of seven per centum per annum, from the 11th day of October, in the year 1839, until paid, with the costs of protest and of this suit in the District Court, those of the appeal to be paid by the plaintiff and appellee.

BROWN *vs.* GUNNING'S CURATRIX ET AL.

APPEAL FROM THE COURT OF THE SIXTH DISTRICT, FOR THE PARISH OF RAPIDES, THE JUDGE OF THE DISTRICT PRESIDING.

The obligation of sureties in a curator's bond is that the principal will administer the estate according to law; and his duty requires him to pay all the creditors equally and according to their rank.

A surety is only liable for the acts of the curator during the continuance of his bond; and for the proper application of the funds received during that time.

Judicial sureties are bound *in solido;* so each surety in a curator's bond is liable to the action of the creditors of the estate, for the whole amount claimed.

The action on a curator's bond against the sureties, is not prescribed by the lapse of one year. It is an action *ex contractu.*

This is an action against the curatrix of the estate of Wm. Gunning, deceased, and two of her sureties on her bond, to render them personally liable *in solido*, for failing to pay over the amount of the plaintiff's claim, which is allowed and he is placed on the tableau of distribution among the creditors of said estate. The case has already been before this court; 16 *La. Rep.*, 238.

The tableau of distribution placing the plaintiff thereon as a creditor and proposing to pay him with the other creditors on

said tableau, was homologated and the curatrix directed to pay accordingly, by a judgment of the Court of Probates, the 13th February, 1837.

The curatrix having failed to pay, the plaintiff instituted this suit on her bond, the 5th November, 1838.

On the return of the case to the District Court evidence was taken to show the estate was solvent; or at least there were ample funds to pay the debts placed on the tableau and ordered to be paid.

The defendants among other defences interposed the plea of prescription.

There was a verdict and judgment for the plaintiff against the curatrix and one surety in solido for the sum claimed; and against the other surety for only a part. The defendants appealed.

The plaintiff asks judgment to be amended so as to be against all the defendants in solido for the whole debt and interest.

Dunbar & Hyams, for the plaintiff and appellee.

Bryce & Cochran, for the defendants and appellants.

Brewer, on the same side, made the following points:

1. A woman is incapable of acting as curatrix. A bond given as such is null and void; La. Code, art. 25; 7 Martin, N. S., 466.

2. The bond is without effect, because it is not such a bond as the law requires; not being for one-fourth over and above the amount of the inventory; Mrs. Gunning never took the oath as required by law, nor did letters testamentary ever issue; La. Code, arts. 1119, 1120; 6 Martin, N. S., 528; 1 Idem, 592; 5 Idem, 506; 6 Idem, 402; 6 La. Rep. 355; 11 Idem, 508; C. Pr. art. 924, No. 6, 931.

3. All actions of damages for mal-administration, neglect to perform the duties of curatrix, and all other damages resulting from *quasi offences*, are prescribed against in one year; La.

Code, arts. 3501, 2294, 2295; 11 Toullier, pp. 156, 157; 6 Martin, N. S., 669; Semple et al. vs. Buhler; Fisk vs. Browder et al., 6 Idem, 691; Balfour vs. Browder, Ibid, 708.

4. The declaration of Gunning that he was principal in the note of C. Morgan & Brothers, and that Brown was only bound as surety, was improperly received as evidence against the parties in this suit.

5. The judgment must be reversed because it gives interest on a larger amount than is allowed by the verdict; Bedford et al. vs. Jacobs, 5 Martin N. S., 449; Idem, 462; 7 Idem, 225; 8 Idem, 263.

6. The judgment is for a greater amount than appears to be due by the evidence, even if Brown paid the note and was subrogated to the rights of Morgan & Brothers. The case must therefore be reversed and sent back to inquire into the extent of costs.

Garland, J. delivered the opinion of the court.

This case was before us at the last October term, on an appeal of the plaintiff from a judgment of dismissal for want of jurisdiction and remanded for a new trial; 16 La. Rep., 238.

The defendant, Sophia E. Gunning, was on the 22d of November, 1834, appointed by the Probate Court curatrix of the vacant estate of her deceased husband, Wm. Gunning. On the 14th of January, 1835, she gave bond for $32,382, with the defendants, Barry and Leckie, and W. T. Crain, now dedeceased, as securities, the condition of which states that she has been appointed curatrix as aforesaid, and concludes that if she shall "well and truly execute the duties of her said appointment according to law," then the obligation is to be void, &c. On the 28th of November, 1834, at the request of Mrs. Gunning, the probate judge commenced an inventory of the succession, which consisted of an assortment of drugs and medicines, notes and accounts owing by various persons; lands, slaves and moveable property, and closed the same on the 5th of January, 1835, amounting to $28,667. Shortly after which

the bond aforesaid was given, and she took possession of the estate. On the 27th of the same month, she presented a petition to the Probate Court, stating it was necessary for the payment of the debts that the property should all be sold, which sale was ordered by the court. The stock of drugs and medicines to be payable $2000 on April 1st, 1835, and the balance in twelve months from the day of sale. The household furniture to be sold, all sums under $50 cash, for that sum or more twelve months credit. One slave to be sold for cash. An improvement in the pine woods on a credit of one year; the balance of the real estate and slaves payable in one, two and three years, and the remainder of the personal property for cash. On the 26th of February, 1835, a sale was made on these terms.

The stock of drugs and medicines sold for,.....	$2,583 00
The household furniture was all sold to the same person on twelve months credit for,.....	449 00
The slave was sold for cash for,.....	865 00
The improvements in the pine woods sold for,.....	105 00
The other real estate and slaves sold for,.....	4,900 00
The remainder of the personal property sold for,....	158 00
	$9,060 00

Several articles of household furniture seem not to have been sold.

The cash sales amounted to,.....	$1,023 00
Cash on hand at the time of the inventory,.....	70 00
	$1,093 00
Payment due on the 1st April, 1835,.....	2,000 00
Collected by Goodwin in 1835, say,.....	1,250 00
	$4,343 00
It seems she and her attorney collected on the debts owing the estate the further sum of,.....	1,807 00
Making,.....	$6,150 00

WESTERN DIS. *October*, 1841.

BROWN vs. GUNNING'S CURATRIX ET AL.

The curatrix proceeded with her administration of the estate, without further authority from the probate judge, until the 25th of February, 1836, when she presented to him a statement of the debts of the succession, which she proposed to pay, representing the succession as solvent. On the same day, the judge ordered this statement or tableau to be advertised according to law, but whether it was ever done does not appear. On the 13th of February, 1837, the Probate Court ordered the debts to be paid according to this statement, so far as they are liquidated and extended on the same. In this statement the debt claimed by the plaintiff is put down in the name of the persons under whom he claims, for the full amount of the principal, and it is stated to be bearing ten per cent. interest from May 1st, 1831, and a blank is left for the amount of costs.

On the 27th of February, 1836, the curatrix presented to the parish judge, what she called an account of her administration for the year, in which she represented she had paid debts to a large amount, and collected about the sum heretofore stated, which the judge says he has examined, and compared with the vouchers exhibited; and approves it, with the exception of one charge of $6000, for which there is no voucher; he therefore continues her in the administration for another year. He also states the attorney for the absent heirs was present. This account, which represents a considerable balance in favor of the curatrix, with the judgment thereon, she filed in the Probate Court on the 1st of March, 1836, with a petition praying it be approved and that she be continued in her functions as curatrix. Together with these proceedings she filed another bond dated on the 29th of February, 1836, for the sum of $26,300, the condition of which recites her continuance as curatrix, and concludes with a similar clause to account as the first bond. This last bond was signed only by Barry and Crain as sureties.

What has been done with the estate since the execution of this last bond, the record does not inform us. No account has been rendered in any shape, although a judgment directing the

curatrix to render one was procured by one creditor in February, 1838, and another judgment ordering her to account was rendered in February, 1840, at the instance of the present plaintiff and other creditors, both of which have been disregarded.

On the two bonds, executed as aforesaid, Mrs. Gunning and her sureties, Leckie and Barry, are sued. The plaintiff says he has paid the debt that was owing to Morgan & Brothers, and is now entitled to recover it; that it was placed on the statement or tableau which was homologated and the amount ordered to be paid. Various breaches of the bond are assigned; among them that Mrs. Gunning has collected large sums which she has not paid to the creditors or accounted for; that she has not paid his (plaintiff's) debt, as directed; that she has wasted the estate and otherwise disposed of it contrary to law, wherefore she is responsible to pay the debt claimed.

The defendants have interposed a variety of exceptions, some of which have been disposed of by the judgment of this court sustaining the jurisdiction of the District Court; the others do not seem to require a detailed notice, but we think the court acted correctly in overruling them all.

In their answers to the merits, the sureties specially allege the solvency of the succession, and say it is the fault of plaintiff, he has not made the curatrix pay the debt. She and they admit the debt to be owing to plaintiff, but say it amounts to no more than $1657 53, as appears by the statement or tableau, which has been homologated. There is a general denial as to any waste or neglect, and of any responsibility to pay; there is also an allegation on the part of the sureties that the plaintiff cannot subrogate them to his rights if they are condemned to pay.

There was a verdict against all the defendants for the sum of $470, with interest at 10 per cent. per annum from the 1st of March, 1837, until paid, and against Mrs. Gunning and Barry for the sum of $2,197, with interest at 10 per cent. per

annum on $1,187 83, part thereof from the 1st. of March, 1837, until paid, and interest at the rate of 5 per cent. per annum on the sum of $967 06, from the 1st of March, 1837, until paid. On which the court rendered judgment accordingly, against the parties *in solido*, from which all the defendants have appealed.

In the answers of the defendants, they admit the principal of the debt claimed, say it was placed on the statement or tableau which was duly homologated. We are then utterly unable to see on what ground they can refuse to pay the interest on that principal, which is as plainly stated as the principal itself. That the plaintiff has paid the debt to Morgan & Brothers as the surety of Gunning; the testimony fully satisfies us, and we see no force in the bill of exception taken to the admission as evidence of Gunning's statements, that Brown was his surety on the note, although he appeared to be bound *in solido* on its face.

But the defendants contend, that as they have shown by the account rendered to the Probate Judge, in February, 1836, that the curatrix has paid to creditors all the money she received previous to that period, they are in no manner responsible now. The obligation of the sureties is, that the curatrix shall administer the estate according to law. What then were her legal duties? The articles 1126, 1128, 1140, 1142, 1153, 1160, 1167, 1168, 1169, 1170, 1172, 1173, and others in the Civil Code, and articles 985, 986, 987, 988, and others point them out very distinctly. During the first year of her curatorship, the curatrix paid various creditors of the estate the full amount of their debts, without any authorization from the judge. But say the defendants, she was authorized by the judge afterwards, to pay those debts, and that is sufficient; the act is legalized by the judgment rendered on the 13th of February, 1837. Supposing that to be true, they forget the same order directed them to pay the plaintiff, or those under whom he holds, he therefore was as much entitled to be paid as any one else, and if the curatrix has preferred

The obligation of sureties in a curator's bond is that the principal will administer the estate according to law; and his duty requires him to pay all the creditors equally and according to their rank.

others to him, she and her sureties are responsible to him for the injury.

An examination of the evidence in this case, and a reference to the laws we have quoted, will show the curatrix omitted in many particulars to do what she was required to do. In other respects she violated the law most palpably, and in no respect does it seem to us, she was disposed to do justice to all the creditors. If the curator or curatrix of a vacant estate chooses to proceed under the impression the succession is solvent, to pay a portion of the debts without a legal authorization, they may do so, but must answer for the consequences if any creditor sustains damage or loss thereby. The law regards all the creditors of the same class, as having equal rights, and one is not to be preferred to another, and it is no defence for the legal representative of an estate, or for his sureties, to say, that the funds have been used in paying just debts, if it appears one just debt has been paid in full, and another equally just has been neglected. It is to prevent this, the law requires a statement or tableau of all the debts to be presented to the judge, and his authority obtained, after having called on the creditors to present their claims. If there is money in hand to pay all the creditors, the article 1168 of the Code says plainly what is to be done. If there is not enough, the article 1169 is equally explicit in its provisions.

It is strongly insisted by the plaintiff's counsel, that Leckie is responsible for the acts of the curatrix after she gave the second bond, as the account she filed was not legally homologated. We do not think so. His liability is only for the acts of the curatrix up to the time of her second appointment, and for the proper application of the funds received previous to that date. That amount seems to have been about $6,150; if, in the application of that sum, a portion of the creditors have been neglected, he is responsible to them for the sum they have lost thereby. This is the view which the court and jury seem to have taken of the case, and allowed the plaintiff his

A surety is only liable for the acts of the curator during the continuance of his bond; and for the proper application of the funds received during that time.

WESTERN DIS. *October*, 1841.

BROWN *vs.* GUNNING'S CURATRIX ET AL.

pro rata share, in which we do not think there is any material error.

We cannot agree with the defendant's counsel, that the sureties are only jointly bound. They are judicial sureties, and as such, are bound *in solido* to the creditors of the estate, the action is therefore well brought. The recourse which they may have on the estate of Crain, is not a matter with which the plaintiff has any thing to do.

Judicial sureties are bound *in solido*; so each surety in a curator's bond is liable to the action of the creditors of the estate, for the whole amount claimed.

We have attentively examined the plea of prescription filed in this court, and the authorities relied on to sustain it. We think it must fail. This is an action arising *ex contractu* on the bonds given by the parties, not one sounding in damages for an offence or *quasi* offence. The cases in 6 Martin N. S. 665, 691; were both actions against the sheriffs personally for damages, and not actions on their official bonds, alleging breaches thereof. Had such been their character, we imagine the decision of this court would have been different from what it is.

The action on a curator's bond against the sureties, is not prescribed by the lapse of one year. It is an action *ex contractu*.

The judgment of the District Court is therefore affirmed with costs.

SHIPMANS & Co. vs. ARCHINARD.

APPEAL FROM THE COURT OF THE SIXTH DISTRICT FOR THE PARISH OF RAPIDES, THE PARISH JUDGE PRESIDING.

The guarantor of a note is a competent witness on the part of the maker, in a suit by the endorsee against the latter; for it is the interest of the witness, that the plaintiff should recover, and he is called upon to testify against his own interest.

So where plaintiffs received the note sued on *after maturity*, the defendant may produce in evidence the letter of the payees and original holders, to show, that the suit was premature, and that *a certain time* had been allowed for payment.

This is an action against the maker and endorsers of a promissory note; the endorsers, W. P. & T. Hickman, "guarantying the payment of said note, and waiving demand, protest and notice."

The defendant, Archinard, admitted the execution of the note, but averred the plaintiffs had no right to sue, and that the suit was premature; the payees and holders agreeing after it became due, and before its transfer, to wait *a certain time for payment*. That they had transferred the note in violation of said agreement, to the knowledge of the transferees, the present plaintiffs.

Interrogatories were propounded touching the defence; but on the trial evidence and a witness to prove the defence, were rejected and a bill of exceptions taken.

There was judgment against all the parties to the note *in solido*, and Archinard, the maker, alone appealed.

O. N. Ogden, for the plaintiffs.

Dunbar & Hyams, for the defendant.

Martin, J. delivered the opinion of the court.

The defendant and appellant has placed this case before us on a bill of exceptions to the rejection of the testimony of William P. Hickman, and of a letter from W.P. & T. Hickman, the

WESTERN DIS. *October*, 1841.

SHIPMANS & co. vs. ARCHINARD.

payees of the note sued on, to the defendant, the maker. The witness was offered to prove, that the suit was premature; he had guaranteed the payment of the note to the plaintiffs, the endorsees, who had received it after its maturity; and the judge informs us, he was rejected on the following ground: "That a person or persons, who had guaranteed and secured absolutely the payment of an obligation, the tenor of which showed it to be due and exigible, cannot be permitted to come into court and show by their testimony, that the action is premature." The plaintiff and appellee has drawn our attention in support of the opinion of the first judge to the case of Lesassier, curator, vs. Hurtzel et al., 8 Martin, N. S., 265, in which the defendant, to support the plea of novation, offered as a witness his surety, who had become the principal debtor in the obligation sued on; which had wrought the novation of the first. We were of opinion, that the lower court had not erred in rejecting him, because "if it were true, that he engaged to pay the debt of the principal, then it follows, that he was interested to defeat this action; because the principal, if condemned, would have a right to call on the witness for the debt and the costs incurred by the failure of the latter to discharge the obligation." In that case it was the interest of the surety to protect Hurtzel and defeat the plaintiff's action. In this action it is the interest of Hickman, the witness, to support the plaintiff's claim, and to have the defendant, his principal, condemned; for an effectual recovery by the plaintiff would annihilate the witness's obligation as a guarantor. This case is the converse of that relied on by the present plaintiff. In the one, the discharge of the defendant would give him a claim against the witness; in the other, the success of the defendant would leave the witness liable to an action, which would be destroyed by the plaintiff's effectual recovery. The witness therefore was, in our opinion, improperly rejected, as he was called upon to testify against his own interest. 4 M. R., 472; 4 Martin, N. S., 172. The bill of exceptions is silent as to the reasons which influenced the court in the rejection of the letter. The

The guarantor of a note is a competent witness on the part of the maker, in a suit by the endorsee against the latter; for it is the interest of the witness, that the plaintiff should recover, and he is called upon to testify against his own interest.

So where plaintiffs received the note sued on *after maturity*, the defendant may produce in evidence the letter of the payees and original holders, to show that the suit was premature, and that *a certain time* had been allowed for payment.

plaintiff had received the note after its maturity; the maker therefore was entitled to every equitable defence, which he might have opposed to the payees, whose letter was offered as evidence of an obligation, which the defendant contended, they had incurred, to forbear sueing him. It ought for these reasons to have been received.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, as well as the interlocutory judgment overruling the defendant's exception to the prematurity of the suit; all proceedings between the interlocutory and final judgments set aside; and the case remanded for a new trial upon the exception, with directions to the District Court, to admit the testimony of W. P. Hickman and the letter of W. P. & T. Hickman: the plaintiff and appellee paying the costs of the appeal.

BROWN'S EXECUTORS *vs.* COPLEY & JESSUP.

APPEAL FROM THE COURT OF THE SEVENTH DISTRICT, FOR THE PARISH OF OUACHITA, THE JUDGE OF THE SIXTH PRESIDING.

According to the provisions in articles 379, 380 and 381 of the Code of Practice, the vendee of a slave, when sued for the price, will be allowed time to cite in warranty the person to whom he sold, and who promised to pay the debt, although the plaintiff, or original vendor, never accepted him as his debtor.

This is an action against the principal and his surety on a note of $810, given for the price of a slave, purchased by Copley at the probate sale of S. D. Brown's estate.

WESTERN DIS. *October*, 1841.

BROWN'S EXECUTORS *vs.* COPLEY & JESSUP.

The defendants admitted the execution of the note and its consideration. They averred, that Copley sold the slave to one A. D. Peck, who covenanted and bound himself to take up their note to the plaintiffs. They annexed the act of sale to Peck to their answer, and prayed for time until the next term, to cite him in warranty. They also pray for the same judgment over against him, that may be rendered against them.

The district judge overruled the call in warranty, and the defendants excepted. There was judgment for the plaintiffs, and the defendants appealed.

McGuire, for the plaintiffs and appellees.

Downs & Copley, for the defendants.

Garland, J. delivered the opinion of the court.

The defendants are appellants from a judgment rendered against them for the price of a slave purchased by Copley at the Probate sale of the estate of Samuel D. Brown, deceased, for which he and his co-defendant gave their promissory note. Some time after, Copley sold the slave to one Peck, who expressly covenanted and agreed to pay the note of defendants to Brown's estate, and in all things in relation to said note to save them harmless. In the court below, the defendants in their answer set forth all the facts, and attach to it a copy of the sale to Peck, and call upon him to defend them, and asked the legal delay to have their warrantor cited. This was objected to by the plaintiffs' counsel, and the court overruled the motion, and the defendants excepted. This is the only point in the cause, and we think the court erred in not granting the delay. The articles 379, 380 and 381 of the Code of Practice seem too clear and imperative to admit of doubt or construction. In the case of Anselm vs. Wilson, 8 La. Rep., 37, it was held, as there was no privity between the plaintiff and Erwin, who was to reimburse the note to defendant, that delay would not be accorded to call him in. The agreement in that case was not that Erwin would pay the plaintiff the defendant's debt, but in

case she had to pay it, he (Erwin) would reimburse her. The contingency in that case was, not to operate on Erwin, until it was known, whether defendant had to pay. The court, in that case, went as far as it well could, to avoid the effect of a positive law, which in its operation in the country, is calculated to produce delay in the collection of debts, and considerable embarrassment to creditors.

We are bound to execute the law in all cases, however hard its operation may be, when it appears, its provisions are not seized upon to evade the administration of justice, and the collection of just debts. In this case, we see nothing in the conduct of defendants at all suspicious.

The judgment of the District Court is therefore annulled and reversed, and this case remanded to the District Court, with directions to permit the defendants to call Alexander Peck in warranty, and otherwise to be proceeded in according to law; the plaintiffs paying the costs of this appeal.

HOUGHTELING *vs.* FISHER.

APPEAL FROM THE COURT OF THE TENTH DISTRICT, FOR THE PARISH OF NATCHITOCHES, JUDGE CAMPBELL OF THE DISTRICT PRESIDING.

A new trial should not be granted, to enable the party to prove the tender of a slave in a redhibitory action, on the ground of an oversight in his counsel to prove it on the trial, when it does not appear, any diligence was used to procure the proof.

The discretion in the Supreme Court, to remand causes for a new trial, will be exercised only in extreme cases, when the party has shown due diligence and is guilty of no *laches*.

WESTERN DIS. *October*, 1841.

BOUGHTELING vs. FISHER.

This is a redhibitory action. The plaintiff alleges, he purchased a slave named George from Mrs. Sarah L. Fisher, for $1000. That he is subject to redhibitory defects and vices, which entitle him to a rescission of the sale. He avers, he has tendered back said slave to the agent of the defendant, who peremptorily refused to receive him. He prays judgment for a rescission of the sale and return of the price, and 500 dollars in damages.

The defendant pleaded the general issue. There was first a verdict for the plaintiff and a new trial granted.

On the second trial there was no proof produced of a tender of the slave, and there was a verdict and judgment for the defendant. After an unavailing effort to obtain a new trial, the plaintiff appealed.

Taylor, for the plaintiff and appellant.

Dunbar & Hyams, for the defendant.

Morphy, J. delivered the opinion of the court.

This suit was brought to obtain the rescission of the sale of a slave on the ground of redhibitory vices and maladies. The plaintiff at first obtained a verdict, but on a motion for a new trial, it was set aside. The second jury gave in their verdict in favor of the defendant. After an unsuccessful effort to set it aside, a judgment was entered, from which plaintiff has appealed.

He has drawn our attention to the affidavit he presented to the judge below, in support of his application for a new trial; he sets forth in it, that previous to the institution of this suit he had made a formal offer, in the presence of three witnesses, to deliver back the slave to Wm. Hunter, the agent of defendant; that Hunter refused to receive the slave in positive terms; that he was prepared to prove the tender of the slave to defendant, but that owing to the oversight of his counsel, the proof was not made, and that irreparable injury will be done

to him, unless a new trial be granted. This application was further supported by the sworn declaration of one of the three witnesses, referred to in plaintiff's affidavit, that in June, 1840, he did, at the request of the plaintiff, together with two other persons, accompany him, (the plaintiff,) when he was going to offer Hunter, defendant's agent, to take back the slave; that in their presence the tender was made, but that Hunter peremptorily refused to receive him.

We are requested to remand this case for a new trial, and not to suffer the plaintiff to be the victim of an oversight of his counsel. If it appeared clearly from the affidavit, that the witnesses to prove the tender of the slave, had been duly summoned and were in attendance, but not examined through an oversight of the counsel, the plaintiff would perhaps have had some claim to relief at our hands; but it does not appear, that any steps were ever taken, to procure their attendance in court. From an examination of the record it further appears, that the tender of the slave was not proved even on the first trial, and it is perhaps the very ground, on which a new trial was granted. The discretionary powers conferred on this court to remand causes, will be exercised only in extreme cases, when the party has shown due diligence, and is guilty of no *laches*. Should we remand this cause on the ground submitted to us, we might be called upon to do it in almost every case, where through neglect, oversight, or any other cause, the party or his counsel may fail to adduce material evidence on the trial.

A new trial should not be granted, to enable the party to prove the tender of a slave in a redhibitory action, on the ground of an oversight in his counsel to prove it on the trial, when it does not appear any diligence was used to procure the proof.

The discretion in the Supreme Court, to remand causes for a new trial, will be exercised only in extreme cases, when the party has shown due diligence and is guilty of no *laches*.

It is therefore ordered, that the judgment of the District Court be affirmed with costs.

WESTERN DIS.
October, 1841.

PEETS
vs.
WILSON.

PEETS *vs.* WILSON.

APPEAL FROM THE COURT OF THE TENTH DISTRICT FOR THE PARISH OF CLAIBORNE, JUDGE CAMPBELL PRESIDING.

A mortgage executed by the maker of a note, to secure the endorsers, becomes null when there are no steps taken to fix their liability; and the transfer to the holder of the note after the endorsers are discharged for want of protest and notice, confers no rights on the transferee.

The fact of an endorser taking a mortgage from the maker of a note to indemnify him against loss, does not dispense with demand, protest and notice.

This is an action of mortgage. The plaintiff alleges he is the assignee and transferree of a mortgage on two half-quarter sections of land, executed by one R. Stiles to Canfield & Drake to secure them against their endorsements on two notes of his and that said mortgage was given to secure the payment of said notes. The debt claimed amounts to $458, for which he prays judgment against Wilson on his said mortgage, and that the land be sold to satisfy the debt.

Wilson claimed the land as having purchased it at sheriff's sale, under an execution against Stiles, which issued on a judgment of R. Thompson.

The mortgage was executed by Stiles to Canfield & Drake, the 16th January, 1839, to secure the payment of the debt arising on the notes they had endorsed; but after they were over due, and no steps taken to fix the liability of the endorsers.

The land in contest was sold the 21st day of May, 1839, subject to plaintiff's mortgage, by the deputy sheriff, and Wilson, the principal sheriff, became the purchaser for $150.

There was judgment for the defendant and the plaintiff appealed.

Lawson, for the plaintiff and appellant.

Hyams and *J. Blair Smith*, for the defendant.

Morphy, J. delivered the opinion of the court.

This is an hypothecary action by which a tract of land held by defendant as a third possessor is sought to be made liable for two notes amounting together to $458 38, drawn by one Richard Stiles to the order of Rueben Drake and Martin Canfield, and by them endorsed over to the present plaintiff *after maturity*. This transfer took place on the 12th of February, 1838, and suit was immediately brought on them by attachment against the maker, Richard Stiles. On the 16th of January, 1839, Richard Stiles was prevailed on by Drake & Canfield to give them a mortgage on the property now in the possession of the defendant, to secure the payment of these notes which he mentions in the act of mortgage as being in the hands of Peets. This mortgage was recorded in the office of the parish judge of Claiborne, on the 21st of January of the same year, and by the said Drake & Canfield assigned to the plaintiff on the 25th of September following. The defendant purchased the property thus mortgaged by Stiles at a sale under execution, made at the suit of Thompson, a judgment creditor of the latter who levied on it on the 25th of March, 1839.

This case has been argued in writing and not without some ingenuity on both sides. It is urged on the part of the defendant and appellee that if the mortgage assigned to plaintiff and under which he claims was given to Drake & Canfield to secure them from the consequences of their endorsements on the notes, as is alleged in the plaintiff's petition, the mortgage was a nullity. That it could have no binding force and effect because Stiles was not indebted to them at the time it was given; as the notes had been by them transferred to the plaintiff nearly a year previous to its date; and that it is essential to the existence of a mortgage that there should be a principal debt to serve as a foundation for it. That when a bill or note is endorsed after maturity, demand must be made within a reasonable time and notice given to the endorser who is otherwise discharged, and that as in this case the plaintiff took no step to fix the liability of Drake & Canfield, the mortgage, if it

WESTERN DIS. *October*, 1841.

PEETS *vs.* WILSON.

ever had validity, was discharged; the object for which it was given having been accomplished. To this, it is answered that the endorsers were not discharged by want of notice and demand, as they had taken a mortgage to secure themselves. That even if they were they had a right to waive the discharge and avail themselves of the benefit of the mortgage, at least against subsequent creditors and purchasers; that the expressions in the act of mortgage and the act of assignment would be alone sufficient to render them liable unto plaintiff; and that at all events defendant has no right to complain as the whole transaction took place and the mortgage was recorded before he had acquired any right whatever to the property; and he is not shown to have ever been a creditor of Stiles. That he bought with full knowledge of the prior mortgage and cannot now be allowed to contest its validity. From a close examination of the whole context of the mortgage to Drake & Canfield, it is quite clear to us that the instrument was intended to secure them from the consequences of their endorsements on the two notes of the mortgagor. It was based then on a consideration which did not exist at the time; the principal obligation to which it was to attach had already been released by the laches of plaintiff; the mortgage was in their hands a useless piece of paper, conferring on them no rights whatever of which they could avail themselves or which they could transfer to others. It was an absolute nullity; La. Code, articles 3251 and 3252. From the circumstances disclosed by the record in relation to the attachment previously sued out on these notes by the plaintiff against the maker, Stiles, it is altogether improbable that the latter could have intended that the mortgage should in any case enure to his benefit; he knew that the notes were in plaintiff's hands and what was more simple than to give the mortgage directly to him; but his intention, as alleged by the petitioner himself, was to save Drake & Canfield harmless of endorsements. We have held (9 La. Rep., 334,) that the fact of an endorser taking a mortgage from the maker of a note to indemnify him against loss, does not dispense with demand

A mortgage executed by the maker of a note to secure the endorsers, becomes null when there are no steps taken to fix their liability; and the transfer to the holder of the notes after the endorsers are discharged for want of protest and notice, confers no rights on the transferee.

The fact of an endorser taking a mortgage from the maker of a note to indemnify him against loss, does not dispense with demand, protest and notice.

and notice of protest; still less can it have the effect of reviving a liability already extinguished by the want of such demand and notice. But it is said that defendant being a third possessor and having bought the property subject to this mortgage recorded before his purchase, has no right to contest its validity. The sheriff's return does not show that the property was sold subject to this mortgage, or that the bid of plaintiff was over and above its amount. It states, it is true, that the certificate of the recorder of mortgages showing the existence of this prior mortgage was read, but it further states that the property was absolutely sold for one hundred and fifty dollars, leaving doubtful what should have appeared with certainty from his return, to wit: that the bid was over and above the amount of the prior mortgage. By articles 679 and 683 of the Code of Practice, it is made the duty of the sheriff to announce that the property is sold subject to the prior mortgages, and that the purchaser is authorized to retain in his hands out of the price for which the property will be adjudicated the amount of such mortgages and give his bond for the surplus. The return of a sheriff must show a strict compliance with the requirements of the law, and we cannot presume the fulfilment of material formalities which do not appear on its face; from this return the bid appears to us to have been given for the absolute value of the property; 4 Martin, N. S., 162. If such was the case, no adjudication could have legally taken place, the price offered being less than the prior mortgage apparently existing on the property; C. Pr., 684; 3 Martin, N. S., 604. The defendant then, when called upon, under such circumstances, to pay the amount of the prior mortgage or abandon the property, has the right of showing that such prior mortgage was a nullity, that his bid was for the absolute value of the property, and that the adjudication under which he holds was a valid one. This we think he has satisfactorily shown.

It is therefore ordered that the judgment of the District Court be affirmed with costs.

Western Dis.
October, 1841.

HUEY
vs.
DRINKGRAVE.

HUEY *vs.* DRINKGRAVE.

APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT FOR THE PARISH OF OUACHITA, THE JUDGE OF THE FIFTH PRESIDING.

Evidence taken down at the instance of the plaintiff, cannot be stricken out, on the cross-examination, on the ground that it contradicted or went to explain a written contract and was inadmissible. The motion to strike it out came too late; the objections should be stated when the testimony is offered.

This is an action to recover $350, the balance due on a note given for the sale and purchase of plaintiff's improvement on United States land. The act of sale was passed in August, 1839, and expresses on its face, that the plaintiff sells *a certain improvement* on government land, for the sum of $1,675. He prays judgment for the balance due.

The defendant pleaded the general issue; avers he is entitled to a credit on his note of $1,325, and by a special agreement is not to pay interest. He further avers that the plaintiff is indebted to him in the sum of $300, for 300 barrels of corn, which he gathered from the plantation, and which is now pleaded in compensation.

The plaintiff had judgment on the evidence adduced. His witnesses proved that the plaintiff did not sell the corn, then on the land; and on their cross-examination defendant's counsel ascertained there was no other contract between the parties but the written one, or act of sale, and that the evidence was illegal, and should be stricken out, but which was refused, and he took his bill of exceptions. The defendant appealed.

Downs & Copley, for the plaintiff, insisted that parol evidence was admissible in this case. There was no real estate sold; only improvements, &c. 4 La. Rep. 22; 16 Idem 232.

M'Guire, for the defendant, urged that his motion to strike out the parol evidence on the cross-examination was in time, and the motion should have been sustained. The illegality of the testimony could not be discovered until on the cross-examination, it was clear the witnesses were testifying as to the

construction of a written contract. It was not too late then to strike it out; and this principle is supported by Phillips on evidence.

Morphy, J. delivered the opinion of the court.

This action is brought to recover $350, being the balance of a note of a larger amount drawn by defendant to the order of plaintiff. The defence set up is a plea in compensation of three hundred dollars for three hundred barrels of corn, alleged to have been sold and delivered to the plaintiff, at the rate of one dollar per barrel. There was a judgment below in favor of the plaintiff, from which the defendant has appealed.

The evidence shows that plaintiff's claim is for the residue of the price of a sale he had made to defendant of an *improvement or settlement* by him made on public land, together with some negroes, cattle, farming utensils, &c. There was at the time a crop of corn standing on the land, of which no mention is made in the conveyance. Some time after, the plaintiff gathered and removed from the premises all the corn as his property, without any positive opposition on the part of defendant, who was then on the plantation. It is the value of this corn which the defendant offsets against plaintiff's demand, on the ground that plaintiff had no right to take it away as it passed with the sale of the settlement to him.

On the trial, several witnesses were offerred to prove that on various occasions, after the sale, the defendant had acknowledged that the corn belonged to the plaintiff, and had not been sold to him; after this testimony had been taken down, the defendant's counsel moved the court to strike it out, on the ground that it also appeared from the evidence that no subsequent contract had intervened between these parties; that it went to contradict or explain a written contract, and was inadmissible. The judge, in our opinion, correctly overruled this motion. It came too late; the party should have stated his objections to the testimony offerred before it was taken

WESTERN DIS. October, 1841.

LECOMTE vs. SMART.

down. As to its effect when once taken, this court has frequently held, that it will bind the parties even in regard to the sale of real property. 1 Martin N. S. 456; 4 La. Rep. 22 and 64. The testimony leaves no doubt in our minds that the standing crop of corn was not included in the sale, and had remained the property of the plaintiff.

It is therefore ordered that the judgment of the District Court be affirmed with costs.

LECOMTE *vs.* SMART.

APPEAL FROM THE COURT OF THE SIXTH, NOW TENTH DISTRICT, FOR THE PARISH OF NATCHITOCHES, THE JUDGE OF THE SEVENTH PRESIDING.

The southern and south-west boundary of the county and parish of Natchitoches runs from the junction of the Rigolet de Bon Dieu and Red River, in a direction as far south of west as will strike the Sabine River at the point where the north-west corner of the county of Opelousas touches the western bank of that stream.

In settling and determining boundaries not fixed by actual observation and survey, some weight must be given to general understanding and common acquiescence.

Title papers are admissible in evidence in a possessory action, to show the extent and limits of the plaintiff's possession; although no inquiry can be had as to the validity of titles in this action.

Where a person takes possession of land under an apparent title as his own, slight acts will be received as evidence of an intention to take actual possession.

But where a man without any pretence of title, goes upon land claimed by another, he must show unequivocal acts of possession, more *than a year*, to maintain the plea of prescription.

This is a possessory action, instituted in April, 1838, and citation was served on the defendant the 10th May following. The plaintiff alleges he is the owner of two square leagues of land situated in the parish of Natchitoches, and embracing the small Prairie of Lannacoco with the adjacent wood-land; that the defendant within a year ago, took possession, without any shadow or pretence of title, of a part of said land, and is cutting timber, cultivating and committing trespass and waste thereon, to his great damage. He prays that the defendant be condemned to leave the premises and pay damages.

The defendant excepted to the jurisdiction; averring he resided in the Parish of Rapides. This exception was overruled. The general issue and prescription of one year was pleaded.

On the evidence produced, the District Judge was of opinion the defendant was a possessor in bad faith, without any pretence of title, and that the plea of prescription was unavailable. There was judgment for the plaintiff quieting him in his possession of the premises, and the defendant appealed.

Morse & Roysden, for the plaintiff.

Ogden & Brent, for defendant.

Garland, J. delivered the opinion of the court.

This action is instituted to recover the possession of a small tract of land which it is alleged the defendant has entered upon illegally, being a portion of a larger tract, which the plaintiff claims to possess as owner, situated in the Parish of Natchitoches, at a place called the Lannacoco Prairie.

The defendant excepts to the jurisdiction of the court, alleging he resides in the Parish of Rapides, where he should have been sued. This exception was overruled, after hearing testimony, the defendant filed a general denial, and pleaded the prescription of one year to the action. There was judgment against him, and he appealed.

The first question to be considered is, as to the jurisdiction

WESTERN DIS. *October*, 1841.

LECOMTE *vs.* SMART.

of the court, which involves the question of boundary between the Parishes of Rapides and Natchitoches. The line between the Parishes in this quarter has never been surveyed and marked; we are therefore left to form our opinions as to where it is intended to be, from the acts of the Legislature and the evidence in the record. The act of March 16, 1809, 1 Bullard & Curry's Dig. 173, says, "the line dividing the County and Parish of Natchitoches from the County and Parish of Rapides shall intersect the Red River at the confluence of the Rigolet de Bon Dieu, and shall run from thence *on the west in a direct line* to the nearest corner of the County of Opelousas, &c." The French text is, "se prolongera de là vers l'ouest en ligne directe jusqu'à la première limite des Opelousas, &c." The difference in the meaning of the two texts creates some confusion. If, according to a portion of the English text, the line was to run directly west from the Rigolet de Bon Dieu, it is evident it could not be made to touch any portion of the County of Opelousas, as the line of that Parish is now understood. If, according to a part of the French text the line is to run directly to the nearest line (première limite,) of the County of Opelousas, its bearing would be nearly due south, and it would not go to any corner of that County, but intersect the supposed line at a place distant from any corner. According to the first hypothesis, the *locus in quo* would be in the County of Rapides or Opelousas, according to the last, certainly in Natchitoches; but we do not think either supposition exactly correct. To ascertain the meaning of the Legislature, we have to take a portion of both texts, and we think the real intention is, the line shall commence at the junction of the Red River and the Rigolet de Bon Dieu, and run in a direction as far west of south as necessary to strike the Sabine River, at the point where the north-west corner of the County of Opelousas touches the western bank of that stream. Where that point is to be found, is not certainly known, and we are left very much to common report, and such maps of the State as are in our reach to fix it. We suppose that cor-

The southern and south-west boundary of the county and parish of Natchitoches runs from the junction of the Rigolet de Bon Dieu and Red River, in a direction as far south of west as will strike the Sabine River, at the point where the north-west corner of the county of Opelousas touches the western bank of that stream.

ner to be, very near if not exactly at the point where the base line or 31st degree of north latitude intersects the Sabine River. That the County of Rapides should extend to the Sabine River, is evident from a perusal of the act of September 5, 1812, 1 B. & C's. Dig. 174, defining the boundaries of the County of Natchitoches, which is said to be bounded "south by the County of Rapides" and west by the Sabine. If the County of Rapides was not to extend to the Sabine, the County of Natchitoches would join Opelousas.

Assuming these principles as correct, if we draw a direct line from the confluence of the Red River and the Rigolet de Bon Dieu, to the point on the Sabine where the base line or 31st degree of north latitude intersects the Sabine, then according to the maps and the evidence, the Lannacoco Prairie, with the exception of a very small part, will be in the Parish of Natchitoches, if the line should bear more south, then all of it would be in that Parish.

As there is necessarily some uncertainty in making calculations from maps, as to lines not run, we have looked carefully into the parol testimony in relation to the domicil of the defendant. In settling a boundary not fixed by actual observation and survey, some weight must be given to general understanding and common acquiescence. Calvit, a witness, says he lives about eight miles south of the defendant, that he lives in Rapides, and he considers the people in the Prairie as also residents of that Parish. As to himself, he is probably correct, but as to the others, we think the weight of testimony is in favor of their being residents of Natchitoches. This witness further says, the residents of the Prairie vote and pay taxes in Rapides, but he names no one but himself who does. On the other side, Davion says, he has known the Prairie Lannacoco for fifty years, and always considered and understood it was in the Parish of Natchitoches. Burnet, formerly sheriff of that Parish, though not very positive, considers them in that Parish. A brother of the defendant who lives near him, and also sued in a similar action, is proved to have been on the tax

In settling and determining boundaries not fixed by actual observation and survey, some weight must be given to general understanding and common acquiescence.

WESTERN DIS. *October*, 1841.

LECOMTE *vs.* SMART.

list in Natchitoches. The testimony of Lee and Plaisance go to confirm the views of the other witnesses. We therefore think the judgment of the District Judge, as to the jurisdiction, is not shown to be so erroneous as to authorize us to reverse it.

Before proceeding to the merits, our attention is called to a bill of exception taken by the defendant. On the trial, the plaintiff offerred "as evidence a report of the commissioners of the land office, and other evidences of title," to the admission of which, the defendant, by his counsel objected, on the ground that no evidence of title could be given in this action; but the judge was of opinion the documents were admissible to prove the character and extent of plaintiff's possession, for which purpose they were offerred. We think the judge did not err. It is true no inquiry could be made into the validity of the title in this action, but it was evidence to show the extent of plaintiff's possession. He claimed to possess as owner two square leagues including the whole Prairie, and as he did not have it all enclosed, it was necessary to show how far his possession extended by an exhibition of papers purporting to be muniments of title.

Title papers are admissible in evidence in a possessory action, to show the extent and limits of the plaintiff's possession; altho' no inquiry can be had as to the validity of titles in this action.

On the merits, the plaintiff showed he and those under whom he claims, have for more than forty years possessed as owners, all of the Lannacoco Prairie and some of the woodland surrounding it. A *vacherie* has been kept there for many years; there were houses erected, and fences and enclosures made, some persons white or black were always there in possession for him or his ancestors, and a large stock of cattle ranged and grazed on the Prairie. The defendant not having any right, went upon the land, selected a spot on which he proposed to settle, and erected buildings, enclosed a field, and commenced making crops on the land, although he was informed before he commenced his operations, that the plaintiff claimed the land as owner.

We think the possession of the plaintiff is sufficiently established, and he must recover unless his action is pres-

cribed by one year. This is the principal reliance of the defendant, and we have carefully examined the evidence in relation to the character and length of his possession.

The citation was served on the defendant on the 10th of May, 1838. The conclusions we draw from the testimony of all the witnesses, who, in some respects contradict each other are, that the defendant went to the Lannacoco Prairie about the last of December, 1836, for the purpose of selecting a situation to settle. He made choice of a spot, planted a few peach trees, cut down some trees and made an enclosure, but of what kind or to what extent is not definitely shown. He staid but a short time, then went to Mississippi where he had business, remained some weeks, and returned to the Lannacoco Prairie for a few days; he then left, returned to his family in the Parish of St. Landry, a distance of many miles, where he remained, made a crop in 1837, and again returned to the place in question, the latter part of the year 1837, when he erected houses, made enclosures to the extent of from twenty to thirty acres, removed his family, and in 1838 made a crop on the place. The defendant contends he took possession of the premises in 1836, or early in January, 1837, and had never abandoned it, and as the action was not commenced until April, 1838, prescription runs against it. If the defendant had have taken possession of the land under an apparent title, we should regard slight acts as evidence of an intention to take possession, but when a man without any pretence of title goes upon land which he is informed is claimed by another, he must show unequivocal and continued acts of possession for more than a year, to maintain a plea of prescription. In this case, the plaintiff contends that if the defendant had possession in 1836, or in January, 1837, he had abandoned it, and his possession did not really commence until about December, 1837. Of this opinion was the District Judge, and we do not think he erred. The articles 3999 and following, of the Civil Code, relied on by the counsel for the defendant, do not, in our judgment, go to the extent he

Where a person takes possession of land under an apparent title as his own, slight acts will be received as evidence of an intention to take actual possession.

But where a man without any pretence of title, goes upon land claimed by another, he must show unequivocal acts of possession, more *than a year*, to maintain the plea of prescription.

desires. The defendant was distinctly informed the plaintiff had a claim to the land in question, his establishments were there, and there is but little merit in the plea, that he went openly and publicly, and took possession of property which he knew did not belong to him, in violation of the rights of another. We do not think the defendant's plea of prescription will avail him.

The defendant complains the judgment is so indefinite, it cannot be executed. The plaintiff claims to be the possessor of two square leagues covering the whole Lannacoco Prairie, and some of the surrounding wood-land; the judgment accords it to him, the evidence shows he possesses all the Prairie and the wood-land surrounding, which is shown to include the place where the defendant has his houses and enclosures; of these the defendant is adjudged to be the wrongful possessor, and from which he is to be ejected. There is an obvious distinction between this case and that in the 3 La. Rep. 409, relied on in the argument.

The judgment of the District Court is therefore affirmed with costs in both courts.

PEPPER ET AL. *vs.* DUNLAP.

APPEAL FROM THE COURT OF THE NINTH DISTRICT FOR THE PARISH OF MADISON, JUDGE TENNY PRESIDING.

The debtor alone has the right of enjoining proceedings under executory process without giving security. His vendee or the third possessor of the mortgaged property cannot.

On the dissolution of injunctions the damages should only be estimated on the amount actually due at the time of granting the injunction, or the *sum actually enjoined*, and not on notes or instalments of the same debt becoming due during the pendency of the injunction.

This suit commenced by an order of seizure and sale, which the plaintiff's obtained on their vendor's privilege and mortgage against a certain plantation and slaves in the possession of R. G. Dunlap, their vendee.

The defendant took an appeal from this order to the Supreme Court. See the case in 16 La. Rep., 163.

The cause was remanded for new proceedings. In the meantime, on the 18th April, 1839, two days after granting the order of seizure and sale, and after an appeal was taken therefrom, Hugh W. Dunlap, the now defendant, purchased out the interest of his brother. After the return of the cause to the District Court, and when the mandate of the Supreme Court was about being executed, to wit: on the 16th February, 1841, the present defendant in the original suit, applied for and obtained an injunction against the order of seizure, without giving security. He set up various grounds and defects in the title, but none of the causes authorizing an opposition and injunction to an order of seizure and sale without giving security were enumerated.

The plaintiffs whose proceedings were enjoined moved to dissolve the injunction on various grounds; among which were that the act of sale contained the clause or *pact de non alienando*, and that the present defendant and purchaser could not avail himself of this mode of proceeding, which was only accorded to the original debtor, &c.

There was a mass of evidence taken on the issues made up

WESTERN DIS. *October*, 1841.

PEPPER ET AL. *vs.* DUNLAP.

between the parties, respecting the title to a portion of the land embraced in the original purchase and sale. The question turned entirely in this court on the right of the defendant to maintain his injunction without having given security.

There was judgment dissolving the injunction with ten per cent. damages and ten per cent. interest on $22,500, which had then become due of the price of the plantation and slaves, instead of $15,363, the sum due and actually enjoined at the suing out of the injunction. The defendant appealed.

Pepper, for the plaintiffs, and in propria persona.

Dunlap in propria persona.

Copley, on the same side.

Bullard, J. delivered the opinion of the court.

The plaintiffs having taken out an order of seizure and sale to enforce their mortgage and vendor's privilege upon certain lands and slaves sold by them to R. G. Dunlap, the latter prosecuted an appeal which came before us at the last term and the judgment of the District judge was affirmed. See 16 La. Rep., 163.

After the proceedings had recommenced in the District Court upon the mandate from this court being sent down, on 16th of February, 1841, Hugh W. Dunlap, who, it appears, had purchased the mortgaged property on the 18th of April, 1839, two days after the original order of seizure was issued and one day after the appeal had been allowed from that order, presented his petition and obtained an injunction to stay proceedings. The judge in granting the injunction exempted him from the obligation of giving security. The grounds upon which he asked for this equitable interference of the court, after expressing his surprise and astonishment that the plaintiffs had obtained an order of seizure and sale, and had caused the property to be advertized for sale, of which he was the bona fide owner, were: 1st. That the petitioners are not the

only heirs of the persons from whom they claim title to the land, but that there is another heir who is about to bring suit against him for her interest. 2d. That the vendors have not complied with the agreement to make R. G. Dunlap a good title, according to their contract, but that a part of the land belongs to the United States. 3d. That having no right to convey the section 22, an action of warranty has accrued to their vendee for the value of the land. 4th. That suit has been brought for one of the slaves; and further that certain persons are about to bring suit for four hundred acres of the land. It is further alleged that when the vendors were about to make the authentic conveyance, R. G. Dunlap called upon them to produce the title papers to the land, that he might examine them, and he was assured by James Pepper, who had made the contract for himself and the others, that the title papers were in the Citizens Bank in New Orleans, and that the title was good; whereas the title papers for section 22 never were filed in that bank but were in the possession of said Pepper, and that he would not have signed the notes for that part of the price, if he had known the real situation of the titles. It is also alleged that by the terms of the contract, R. G. Dunlap was entitled to all the bank stock which the vendors were entitled to in the Citizens Bank of Louisiana, as subscribers; the vendors having represented that they would be entitled to fifty thousand dollars of stock, yet that James Pepper, one of the vendors, with a view to defraud the said R. G. Dunlap, withdrew the subscription or released the same to the bank, without the consent of said Dunlap, and contrary to his interest.

Such is the substance of the grounds for relief set forth in the petition for injunction, upon which that writ was ordered to issue without giving security.

The plaintiffs, whose proceedings were stayed, moved the court to dissolve the injunction with damages for the following reasons: 1st. Because Hugh W. Dunlap, the petitioner, is not the party defendant in said proceedings, and therefore not entitled to an injunction without giving security. 2d. Because

WESTERN DIS. *October*, 1841.

PEPPER ET AL. *vs.* DUNLAP.

from the showing of the plaintiff himself he acquired the property mortgaged since the order of seizure and sale issued, and therefore has no right to oppose the sale. 3d. Because the sale to R. G. Dunlap contains the clause *de non alienando* and consequently his conveyance to the present petitioner is void so far as the respondents are concerned, and he has no right to oppose the sale.

The court dissolved the injunction upon this motion and awarded damages against the plaintiff therein, at ten per cent. upon twenty-two thousand five hundred dollars and interest on the same from the 8th of March, 1841, till the 26th of May, 1841.

The debtor alone has the right of enjoining proceedings under executory process without giving security. His vendee or the third possessor of the mortgaged property cannot.

In dissolving the injunction upon some of the grounds set forth in the motion, we are of opinion the court did not err. The articles 738, 739 and 740 give to the *debtor alone* the right of enjoining proceedings under executory process without giving security. It is clear that the present plaintiff is not the debtor of the vendors of the mortgaged property. He acquired the property not only *pendente lite* but with the *pact de non alienando* in the original conveyance. That clause would deprive him even of the advantage of being treated as a third possessor, and by no means should it be considered as giving him the privilege of making opposition and arresting the proceedings of the hypothecary creditor without giving bond.

But even supposing that the defendant was entitled to all the privileges and advantages of the original purchaser it appears to us that even he would be bound to give security in a case like the present. The articles of the code above referred to set forth the causes for which proceedings may be arrested on opposition without giving security. They are all such as go to the discharge of the debtor by reason of payment, release, prescription or the like, since the date of the contract, or to the nullity of the contract itself for want of a free consent, as that it had been obtained by fraud, violence, fear or other unlawful means. Although there is a suggestion of fraud in the petition as to that part of the contract which relates to the

bank stock, yet the party does not claim that the whole contract should be annulled on that or any other account.

Although we agree with the court below that the injunction ought to be dissolved, yet we think a greater amount of damages was awarded than the statute justified. The damages should have been estimated at the time the injunction was obtained and not upon the notes which fell due afterwards. In this therefore the judgment must be reformed. There was due at that time a sum of $15,363, instead of $22,500, upon which the interest and damages were estimated.

On the dissolution of injunctions the damages should only be estimated on the amount actually due at the time of granting the injunction, or the *sum actually enjoined*, and not on notes or instalments of the same debt becoming due during the pendency of the injunction.

It is therefore adjudged and decreed that the judgment of the District Court be reversed; and proceeding to render such judgment as should, in our opinion, have been given below, it is further ordered and adjudged that the injunction be dissolved and that the defendants recover of the plaintiff in injunction interest at the rate of five per cent. upon the sum of fifteen thousand three hundred and sixty-three dollars from the 8th of March, 1841, until the 24th of October, 1841, and five per cent. damages on the said amount, the costs in the District Court to be paid by the plaintiff and appellant, those of the appeal to be paid by the defendants and appellees.

Western Dis. *October*, 1841.

WOODBURN *vs.* FRIEND ET AL.

WOODBURN *vs.* FRIEND ET AL.

APPEAL FROM THE COURT OF THE SEVENTH DISTRICT FOR THE PARISH OF OUACHITA, THE JUDGE OF THE FIFTH PRESIDING.

Sureties in bonds taken in judicial proceedings are bound *in solido;* being entitled to neither division nor discussion: so several sureties in a 12 months bond are each bound for the whole sum.

Where the creditor does not suspend his execution so as to put it out of his power, or the surety (if he should pay,) to pursue the debtor, it is no prolongation of the time of payment.

When it appears in the progress of the trial, that a payment has been made of part of the debt; although the injunction may have to be dissolved for want of an allegation of payment, yet a new one for this amount should be granted and perpetuated.

Where the party is entitled to a new injunction *instanter* for a part of the debt on the dissolution of the first, he will not be mulct in damages.

This case commenced by injunction. The defendant, Friend, by his attorney took out execution on a 12 months bond signed by P. G. Oliver, as principal, and by the plaintiff, and two others as sureties, under which plaintiff's property has been seized by the sheriff to satisfy the entire bond. He avers he only signed as surety and cannot be liable for more than his share, to at least one third. He further states that the defendant held up his execution and gave a prolongation of time to the principal in the bond, until he gathered and disposed of his crop, and is now insolvent. He prays that Friend, and the sheriff be enjoined and prohibited from proceeding in said seizure, and that he be released from all liability on the bond, and the injunction be made perpetual.

The defendant pleaded the general issue, and called on the plaintiff to prove his allegations in a summary manner, and that the injunction be dissolved with damages.

The evidence showed that a quantity of cotton had been shipped by Oliver, the principal in the bond, to the knowledge of Friend and his attorney, which should have been seized, as it was shipped long after the bond became due.

There was judgment dissolving the injunction, with ten per cent. interest, and 50 dollars as special damages for attorney's

fee, against the principal and surety *in solido*. The plaintiff appealed.

Garrett, for the plaintiff.

Copley, for the defendants.

Bullard, J. delivered the opinion of the court.

The plaintiff having signed a twelve months bond, as surety of Oliver, together with two other sureties, in favor of Friend, and execution having issued upon it, and levied upon the plaintiff's property, he obtained an injunction to stay proceedings, on the allegation that he signed the same as joint surety with his co-sureties, Robertson and Warfield, who became equally and jointly bound with him, and that he is in no event bound for more than one third; but that the sheriff has seized more property than is necessary to pay the whole bond. He further alleges that he is not liable for any part of the bond, because after it fell due on the 24th day of July, 1840, Friend, the obligee, granted a prolongation of term of payment to Oliver, the principal, without the consent of the plaintiff his surety; and agreed and promised to wait with him until he should have gathered his cotton and corn crop, then growing on the land which was mortgaged to secure the payment of the twelve months bond; and that an execution which had issued upon the bond was returned into the clerk's office, by order of Friend's counsel, that the crop was more than sufficient to pay the whole bond, and that in consquence of the laches of Friend he can no longer subrogate the surety in his action against the principal who has become insolvent.

The injunction was dissolved with damages, and the plaintiff appealed.

The first ground upon which the injunction was granted, is clearly untenable. Sureties upon bonds taken in judicial proceedings are bound *in solido*, being entitled neither to discussion nor division.

Sureties in bonds taken in judicial proceedings are bound *in solido*; being entitled to neither division nor discussion: so several sureties in a 12 months bond are each bound for the whole sum.

WESTERN DIS. *October*, 1841.

WOODBURN *vs.* FRIEND ET AL.

The facts shown in relation to the second ground, to wit: the granting of prolongation of the term of payment to the principal debtor without the consent of the surety, are, that an execution was issued in August, not long after the bond fell due; that it was not served, and was finally returned in November or December; and that in the meantime the crop of Oliver, the principal, amounting to about sixty bales, was disposed of, and that ten bales of it went into the hands of Mr. Copley, the attorney of Friend, who had ordered out the execution, and who afterwards personally took it to the office after it had run out, and the deputy clerk swears, *wished him to alter the dates*, which witness declined. It appears that Friend agreed to suspend the execution if Hempkin would agree to it, and that the execution was not levied. It is further shown that Mr. Copley received two hundred dollars for Friend, which was paid by order of Oliver by Mr. Bry, who had shipped the crop.

Where the creditor does not suspend his execution so as to put it out of his power, or the surety (if he should pay,) to pursue the debtor, it is no prolongation of the time of payment.

In the case of Huie vs. Bailey, which was a much stronger one than this, we held, that permitting the principal debtor to go to Texas without the consent of the endorser, upon a promise to pay on his return, did not discharge the latter. In all such cases there must be a suspension of the right to sue by a valid contract, for if the surety might at any moment pay and pursue the debtor under the legal subrogation, he is not discharged by the delay accorded to the debtor. We cannot regard the two hundred dollars paid the attorney, as a consideration for suspending the execution, because this is not proved. 16 La. Rep. 219.

When it appears in the progress of the trial, that a payment has been made of part of the debt; although the injunction may have to be dissolved for want of an allegation of payment, yet a new one for this amount should be granted and perpetuated.

The injunction was properly dissolved, but as it appeared in the progress of the trial that $200 had been received by the counsel of Friend, for that amount the court ought in our opinion, at once to have granted a new injunction, and if it had been made the subject of complaint in the petition, would have authorized the court to perpetuate the injunction *pro tanto*, and in that event no damages could have been given under the act of 1831. 11 La. Rep. 483.

Where the party is entitled to a new injunction *instanter* for a part of the debt on the dissolution of the first, he will not be mulct in damages.

Equity forbids that under such circumstances the party should be mulcted in heavy damages in obedience to the literal tenor of the statute; for it amounts to the same thing whether the first injunction be partially sustained or a new one allowed *instanter*.

It is therefore adjudged and decreed that the judgment of the District Court be avoided and reversed, and proceeding to render such judgment as ought, in our opinion, to have been given below; it is further adjudged and decreed that the injunction be dissolved with costs, except for the sum of two hundred dollars for which it is rendered perpetual, reserving to the plaintiff the right, if any he have, to be further credited for the ten bales of cotton alleged to have been delivered to the attorney of the defendant, and that the defendant pay the costs of this appeal.

SELBY *vs.* BASS ET AL.

APPEAL FROM THE COURT OF THE NINTH DISTRICT, FOR THE PARISH OF CARROLL, JUDGE TENNY PRESIDING.

Where a party having two capacities, takes possession of property, and it is doubtful in which capacity he holds, the legal presumption is that he takes in the capacity the law authorises, and that he will do what it is his duty to do.

So where the widow causes an inventory to be made of her deceased husband's estate, and omits to put some articles in it; renounces the community, but acts as administratrix and as tutrix of her minor children; and then as executrix under a will found, and pays some debts without the order of the judge, she is not liable as intermeddler, when there is no attempt at concealment or fraud shown.

This is a suit against Martha A. Bass, late wife of D. O.

WESTERN DIS *October*, 1841.

SELBY VS. BASS ET AL.

Barton, and now wife of W. A. Benton, claiming from her individually the sum of $5060, which the plaintiff alleges, is due to him from the estate of her late husband for counsel fees, and a note of D. O. Barton for $3500; for all of which he alleges, she has made herself liable by intermeddling and taking possession of her deceased husband's estate illegally, &c. He prays judgment against her individually; and also against her present husband.

The defendant, Madame Bass, denied her liability or that she was guilty of intermeddling; and averred, that whatever she did, was by the advice of the plaintiff, as her legal adviser and attorney at law.

There was judgment, under the pleadings and the evidence produced, in favor of the plaintiff, and against the defendant, for the sum of $4,930, with 10 per cent. interest on the amount of the note; and 5 per cent. on the remainder. She appealed.

McGuire & Garrett, for the plaintiff and appellee.

Copley & Downs, for the defendant.

Garland J. delivered the opinion of the court.

The plaintiff alleges, that Martha A. Bass, late widow of David O. Barton, and now wife of W. M. Benton, is indebted to him the sum of $5,060, with interest at 10 per cent. per annum on $3,500, from the 16th of March, 1838, and 5 per cent. on the remainder, from judicial demand. This claim is alleged to be made up as follows:

1st. Of a note of $3,500, with 10 per cent. interest, as claimed, which David O. Barton in his lifetime had given to plaintiff.

2d. Of the sum of $80, which D. O. Barton owed plaintiff as a lawyer's fee in a suit, wherein he represented Barton.

3d. A sum of $50, also a lawyer's fee, owing by Barton for services rendered him.

4th. The sum of $270, also a lawyer's fee, in a suit in which plaintiff represented Barton and wife.

5th. The sum of $80, another fee as Barton's counsel in suit No. 127.

6th. The sum of $50, also a fee as Barton's counsel in another suit.

7th. Another fee of $50, for services as counsel in preparing title papers.

8th. That after the death of D. O. Barton, the defendant, his widow, employed the plaintiff as sole counsel, to advise and represent her in the settlement of the succession. He was to act as such counsel until the succession was settled. In this capacity he assisted in having Mrs. Barton confirmed as tutrix of her minor child, attended to having an inventory made, advised and drew up an act, whereby Mrs. Barton renounced the community of acquests and gains, had her appointed administratrix, and advised and acted for her and various other matters relating to the succession. He also says, that in consequence of being so retained, he refused various large fees in cases against the said succession, for all which he claims the sum of one thousand dollars.

It is further alleged, that after the death of D. O. Barton, the defendant, his late widow, took possession of all his property, amounting to about $40,000, and appropriated it to her own use. That she examined the papers belonging to the succession before the seals were placed on them. That she did not include in the inventory all the property belonging to the succession, but concealed a part with the intention of appropriating it to her own use, by means of all which acts she has made herself personally liable, to pay the demands of the plaintiff against the succession of D. O. Barton. The marriage of Mrs. Barton with W. M. Benton is alleged, and a judgment *in solido* asked against them.

The defendants for answer deny the plaintiff's allegation and demands, especially those charging an interference with or concealment of any portion of the effects of the succession. They set up the renunciation of the community by Mrs. Barton, under the advice of the plaintiff. That she always acted

by his advice and under his counsel, and if she ever did any act in relation to said succession, whereby she incurred any responsibility, it was the result of the plaintiff's counsels and advice, and she is not responsible to him, and he cannot take advantage of them.

The evidence shows, that the plaintiff did render various services as an attorney and counsellor at law for D. O. Barton in his lifetime, also in one case for his wife, for which $270 is charged. It is also shown, plaintiff advised Mrs. Barton to renounce her interest in the community, and drew up the act for her. He took the necessary steps to have her confirmed as tutrix of her minor child, attended the making of the inventory, and did other acts as the retained counsel of the estate. His claims for services seem established, and there is very little contest on that part of the case or as to the note for $3,500, given by Dr. Barton to plaintiff. The liability of the late Mrs. Barton, to pay those debts, is the principal question in the case.

David O. Barton died on the 4th of January, 1839; some days after the plaintiff, as counsel for the widow, presented a petition to the probate judge, stating that fact, that there was a minor child, a considerable amount of property, and other usual circumstances, and concludes by a prayer for appraisers and the taking of an inventory. On this petition on the 15th of the same month; the judge made an order directing an inventory to be made, and he actually made one on the 26th day of said month; the plaintiff being himself present, acting as the adviser and lawyer of defendant. At the taking of that inventory, the probate judge testifies, he saw nothing like unfairness on the part of Mrs. Barton, that there appeared to be a perfect understanding of fairness on her part, his own and the plaintiff's. He does not know of any conduct of Mrs. Barton since her renunciation, to make him believe she was disposed to act dishonestly towards the estate. When the first inventory was made, it appears, some funds in the hands of a commission merchant in New Orleans and some articles of moveable pro-

perty were not put on it, but afterwards, when the widow renounced, a supplemental inventory was made, which included a carriage and horses and other things, but the document is not in the record. The probate judge says, Mrs. Barton took charge of the estate as administratrix and tutrix of her minor child, with benefit of inventory and a renunciation on her part of the community of acquests and gains. She made an inventory of all the papers in presence of the plaintiff, and never, to the knowledge of the parish judge, did anything to induce a belief, she intended to act unfairly, but appeared anxious to inventory every thing belonging to the community. From other witnesses we learn, she always expressed great anxiety to manage the affairs of the succession properly and not involve herself in any liabilities, and in her correspondence and interviews with plaintiff manifested much solicitude about her situation, and that of the succession of her deceased husband. From her letter to plaintiff, written a few days after the inventory, she seems anxious, that a Mr. Chambliss should have the management of the estate, and expresses her apprehensions he will not agree to take it. She urges the plaintiff to see him and persuade him to accept, and if he will not, she tells the plaintiff she would be glad, if he would undertake it, as she knows her situation, and wants to get some one, who will do her justice. At other times she expresses her solicitude, and about two months after the inventory, upon receiving a message from plaintiff, informing her she must not proceed further in the management of the estate, she writes in a style of honest alarm, and begs him to visit her immediately, and inform her of her "danger in that matter."

The crop of cotton made on the plantation in 1838 was put on the inventory, afterwards sent to New Orleans, sold and the proceeds applied to the payment of a debt owing by the estate. Other debts of the estate were paid by the widow, without any particular order from the probate judge, with funds belonging to the estate used for the purposes; but the justice of those claims is not denied. There was a man's saddle in the posses-

WESTERN DIS. *October*, 1841.

SELBY *vs.* BASSET AL.

sion of another person, when Doctor Barton died, which was not put on the inventory, but the witness says, he did not inform the widow he had it, until sometime after the inventory was closed. She then took it and sold it to a neighbor to pay an undisputed debt of the estate. It seems, a pair of timber wheels were also sold to another creditor to pay a debt of $100. A horse, that had been purchased on credit, was given back to the vendor. These acts and the payment of a debt with the funds in New Orleans, are all, that are proved to show an embezzlement or conversion of the property to her own use. No evidence was given to show, the papers were examined previous to the inventory, and they could not have been with much care, as more than two months after a testament was found among them, which left the widow a portion of the estate, and appointed her executrix.

As soon as the will was found, the defendant by the plaintiff, as her counsel, presented a petition to the probate judge informing him in detail of all the circumstances, states she is a legatee, and has also been named sole executrix, without being required to give security, and prays, that the will be probated and she qualified as executrix; all of which was done. The business went on, as the parish judge says, without the executrix sueing any one or being sued for any debt, that he knew of. In the early part of the year 1840, she rendered an account of her administration, and the probate judge says, it has been ordered to be homologated.

About the month of June, 1839, the defendant said to one of her neighbors, that her first impressions were, that she would have nothing to do with the estate, but after consultation with her brother, "she had agreed to take charge of the estate, and she thought she would be able to pay all the debts very easily." At other times she said, "she had concluded to take the property and pay the debts," as her brother advised it, and the plaintiff does not appear to have advised her otherwise.

The succession, although indebted to a large amount, is not

alleged or shown to be insolvent, on the contrary, its solvency is admitted.

Upon these facts the plaintiff attempts to make the widow of D. O. Barton personally responsible for his debts, under the articles 993, 994, 1054, 2387 of the Civil Code. The District Judge gave a judgment for the plaintiff, from which the defendants appealed.

The two last articles relied on by the plaintiff say, "the widow or heir who has concealed or made away with any of the effects of the succession, or partnership, or community of gains, is declared to have accepted the succession or to be concerned in common unity, notwithstanding his or her renunciation." It may well be questioned under this law, whether it is not indispensably necessary, that some fraudulent intent must appear to make a widow responsible for the debts of her husband, or an heir for those of his ancestor; but that is not very material, as it is not shown in this case, that the defendant, previous to the inventory and renunciation made by her, concealed or made away with a single article of property belonging to the succession, nor did she endeavor to prevent the judge and appraisers from making an inventory of all the estate. If there was any fraud, concealment or management in making the inventory, or renunciation, which we do not believe, the plaintiff is as much involved in it as the defendant, and cannot profit by it. He was the principal agent and adviser, and is *particeps criminis*, if any thing is wrong. The case of Ford vs. Ford, 1 La. Rep., 201, is widely different from this, and does not sustain the plaintiff in his position.

To enable the widow to renounce, she must by art. 2382 make an inventory in the same manner as the beneficiary heir, which has been done in this case.

But it is alleged, the defendant is responsible under the article 993 of the Code, having disposed of certain property, without the consent of the judge, to wit: the crop of cotton, the saddle, the wheels and the horse heretofore mentioned. To understand the proper application of this article of the

Code, others must be considered. In the first place, the article is founded on the assumption, that the heir has not made an inventory or renounced the succession, and any act of the kind mentioned without authority, is taken as evidence of his intention not to renounce to, but to accept, he is therefore liable to pay the debts. A tacit acceptance of a succession is supposed from some act, that indicates an intention. La. Code, art. 982; 1 Martin, N. S., 202; 2 Idem, 422. Various acts may indicate that intention, and there may sometimes be an actual intermeddling with the property of a succession, and yet the person not be liable as heir; on the other hand, there are some acts which are foreign to a succession, and yet manifest a will to accept. La. Code, arts. 983, 985, 986; 2 Martin, N. S., 556; 4 Toullier, No. 331; Poth. Commun., No. 538. The intention must be united to the fact, or rather manifested by the fact. La. Code, arts. 984-987. Those acts of property which the person called to the succession, can only do in the quality of heir, necessarily suppose an acceptance, because he acts as owner. Art. 988. But the person called to the succession does not commit an act as heir, by disposing of property belonging to it by another title, than that of heir; as if he should be testamentary executor and heir at the same time, provided, in so disposing of the property, he does not assume the quality of heir; Idem, arts. 988, 989; and with regard to those acts, which may be differently interpreted, it is necessary to distinguish acts of property from acts of administration or preservation, or preparatory acts. The time must also be taken into consideration. Idem, arts. 990, 991.

Where a party having two capacities, takes possession of property, and it is doubtful in which capacity he holds, the legal presumption is, that he takes in the capacity the law authorizes, and that he will do what it is his duty to do.

When a party, having two capacities, takes possession of property, and a question arises as to which he holds under, it is a legal presumption, he takes in the capacity the law authorizes. That is, he will do what it is his duty to do. *Omnia rite esse acta.* 2 Starkie, 673.

When these principles are applied to the facts of this case, it will be seen, that previous to the inventory the defendant had done no act to make herself liable for the debts. If any acts of

fraud, embezzlement or concealment occurred in the taking the inventory, we have before said, the plaintiff is as deeply involved as she is, and cannot profit by them. After the inventory and renunciation, it is clear from the evidence of the parish judge, she acted as administratrix and tutrix of her minor child. After the will was found and ordered to probate, she was then in possession as executrix, and authorized to administer the estate as such, and has so administered ever since so far as the record shows us. If she shall mal-administer, she is liable for her acts, and can be sued in the proper tribunal, and made responsible. If as executrix, she chooses to pay the debts without the authority of the judge of probates, she can do so, and is responsible, if any creditor, heir or legatee suffers damage or injury by it. The succession is admitted to be solvent, and no tableau of distribution is necessary. If she delays the payment of the debts still owing, the creditors can institute the proper proceedings against her as executrix, and enforce payment. The plaintiff, therefore, has a remedy for all his legal rights.

For the amount of the note for $3,500, and interest, for the counsel fees alleged to be owing by D. O. Barton, previous to his death, and for the services rendered by plaintiff as attorney and counsellor in the settlement of the succession, the estate of David O. Barton is responsible, and that portion of his claim must be dismissed, without prejudice to his rights hereafter. As to the claim against the defendant, M. A. Bass, personally, for services rendered and advice as counsel previous to the inventory and renunciation, and at the time of making the latter act, she is responsible in this action, also for the fee in the case of Bowen against her, which was a matter affecting her interests, arising previous to her marriage with D. O. Barton, but as the evidence does not enable us to fix with any certainty the value of those services, we must remand the case for a new trial.

The judgment of the District Court is therefore annulled, avoided and reversed, and all of the plaintiff's demand founded

WESTERN DIS. *October*, 1841.

PATTERSON vs. BONNER.

on the promissory note set forth in the petition, also all his claims against David O. Barton for fees, as his attorney and counsellor at law previous to his death; also for fees as attorney and counsellor in the settlement of his succession, are dismissed without prejudice to his legal rights; in relation to the two claims against the defendant personally for counsel fees, the case is remanded to the District Court, to be proceeded in according to law, the plaintiff and appellee paying the costs of this appeal.

PATTERSON *vs.* BONNER.

ON A RE-HEARING IN PART.

The vendee in a conditional sale or *vente à réméré*, has a greater analogy to a usufructuary than to any other bailee of the property of another, as regards the fruits or increase.

Neither the usufructuary or vendee in a sale *à réméré*, can make the children or young of slaves, born during their possession, *their own*.

In this case a re-hearing was granted "so far as relates to the plaintiff's claim to the children born of the slaves during the time they were in possession of the defendant.

The sole question to be decided here is, do the children or fruits of slaves in a *vente à réméré*, born or accrued during the time they are in possession of the vendee, belong to the vendor on the redemption, or to the vendee?

Elgee, for the plaintiff.

Hyams, for the defendant.

Martin, J. delivered the opinion of the court.

A re-hearing has been granted on a judgment, which we gave in this case in October, 1839; as far as relates to the plaintiff's claim to the children born during the time the slaves were in possession of the defendant. (See 14 La. Rep., 236.) The defendant resists the plaintiff's claim on the ground, that the young of slaves are natural fruits, and further, that they are natural augmentations; La. Code, 537. It is true, the articles quoted expressly state, *that the children of slaves are natural fruits;* this is under the title of usufruct; yet in the preceding article 536, the Code expressly says, that the children of slaves are excepted from the natural fruits, which belong to the usufructuary. From these, it clearly follows, that as far as relates to the usufruct, the children of slaves are not natural fruits. The possession of the vendee in a sale *à réméré* has a greater analogy with that of an usufructuary, than that of any other bailee of the property of another. We therefore think, that the former has the same, but no greater right to the fruits of the thing in his possession than the latter, under the present Civil Code. But the present case is to be tested by the provisions of the former Code, under which this *sale à réméré* was made. That Code does not expressly state, like the present, that the children of slaves are natural fruits, but it places those children on a quite different footing from the young of animals, which both Codes consider as natural fruits. Civil Code, p. 118, art. 42. The law therefore, in regard to the usufructuary was not changed by the new Code, neither do we think, that it was with regard to the vendee in a sale *à réméré;* neither of them could, nor can make the children born during their possession their own. We conclude therefore, that the plaintiff has a right to recover the children born during the possession of the defendant. This was our opinion, when we gave the judgment; but the member of this court, who was then our organ, used the expression, "the slaves *named* in the petition," instead of, the slaves *claimed* in the petition.

The vendee in a conditional sale or *vente à réméré*, has a greater analogy to a usufructuary than to any other bailee of the property of another, as regards the fruits or increase.

Neither the usufructuary or vendee in a sale *à réméré*, can make the children or young of slaves born during their possession, *their own.*

WESTERN DIS. *October*, 1841.

BARTON'S EXECUTRIX *vs.* HEMPKIN.

It is therefore ordered, that the judgment be amended accordingly, and thus amended, remain in full force.

BARTON'S EXECUTRIX *vs.* HEMPKIN.

APPEAL FROM THE COURT OF THE SEVENTH DISTRICT, FOR THE PARISH OF OUACHITA, THE JUDGE OF THE SIXTH PRESIDING.

Fractional townships fronting on water courses are surveyed in small tracts or lots of about 160 acres each, and numbered, but the lot or fractional section numbered 16, is not designated by law as school lands. It is only under the general laws, and where the township is surveyed in square sections that every 16th section is reserved as school land.

In fractional or irregular townships on water courses the secretary of the treasury is required by law to select and designate the school lands.

The chief clerk in the general land office, being designated by law to act as commissioner in case of vacancy, &c., he is therefore an officer known to the law, to be recognized as such and presumed to be acting in obedience to the law.

Registers and receivers are to decide on the facts and sufficiency of proof in cases of pre-emption when no fraud exists; but if they sell land excepted from or not subject to sale by law, their acts are void for want of authority.

The commissioner of the General Land Office may at least suspend if not annul titles granted by the register and receiver, until Congress or the courts can act thereon.

The mere statement of the commissioner of the General Land Office that he has cancelled a certificate of purchase given by the register, &c., is not an eviction which should rescind a sale between third persons.

This is an action to rescind the sale of certain *floats* or rights

to a quarter section of land. The plaintiff alleges that Liles & Carrick being entitled to a pre-emption on quarter section No. 8, township 19, &c., were entitled to *floating* rights of 80 acres each, by virtue of their settlement rights, to be *located elsewhere*; that the defendant purchased them and had them located on fractional section No. 16, in township 20, range No. 13, &c., which is contrary to law, every 16th section being reserved for school lands.

The plaintiff further shows that her late husband purchased said lots or *floats* so located for $3200, on which he paid $1184 and gave his notes for the balance. That since said sale these locations have been declared null by the acting commissioner of the General Land Office, as having been illegally located on school lands. She prays that said sale be rescinded, and that the defendant be decreed to return the part of the price paid, and that the notes be given up, &c.

The defendant pleaded the general issue; admitted the sale of the floats as located by him, but avers the title and locations are legal and good; he denies that they have been legally cancelled or annulled; or that in fractional townships bordering on water courses the 16th number or fractional section is reserved for school lands. He prays that the plaintiff's demand be rejected.

Upon these pleadings and issues the case was tried.

In this case the locations were made on the 16th section or fractional section of a fractional township fronting on the Mississippi; and on the certificate of entry and purchase being sent to the General Land Office at Washington, J. M. Moore, chief clerk and acting commissioner of the General Land Office, wrote a letter to the register and receiver of the Ouachita district, cancelling the certificate on the ground that the location of the *floats* or pre-emption rights had been made on school lands. This is the main question involved in the case; whether this section was by law reserved for school land and had the commissioner authority to cancel the certificate?

WESTERN DIS. *October*, 1841.

BARTON'S EXECUTRIX *vs.* HEMPKIN.

There was judgment for the defendant and the plaintiff appealed.

Downs, for the plaintiff.

M'Guire for the defendant.

Garland, J. delivered the opinion of the court.

This is an action to recover the sum of $1000, which it is alleged the defendant received from the testator of the plaintiff, on account of the sale of a tract of land, to which the latter had no title.

It appears the defendant was the owner of two claims of about 80 acres each, commonly called *floats*; he located them on the lot or fractional section No. 16, in township 20, north range 13 east, which is a fractional township. He paid the money to the receiver of the public monies at Ouachita, who gave a receipt for the same, which would entitle the holders or assignees to a patent for the land, if all the proceedings had have been legal and regular. This receipt was assigned to Barton at defendant's request, by the original pre-emptors, Liles & Carrick, for which Barton gave defendant his notes for $3295 98, payable at different dates, upon which $1000 have been paid. Barton took possesion of the land and has held it ever since, without any actual disturbance, so far as we are informed. This receipt was sent to the General Land Office to obtain a patent, in reply to which application, J. M. Moore, acting commissioner, states in a letter addressed to the register and receiver at Ouachita, that, "the *floats* being located on section 16, which is land reserved by law for the use of schools, I have cancelled the certificate." He then proceeds to direct the officers to return to the parties, the money paid by them for the land. This has not been paid, nor has any further step been taken in the matter. The land in the fractional townships fronting on the Mississippi, was in compliance with the acts of Congress; 1 Land Laws, p. 576, 587; surveyed in tracts of

Fractional townships fronting on water courses are surveyed in small tracts or lots of about 160 acres each, and numbered; but the lot or fractional section numbered 16, is not designated by law as school lands. It is only under the general laws, and where the township is surveyed in square sections that every 16th section is reserved as school land.

In fractional or irregular townships on water courses the secretary of the treasury is required by law to select and designate the school lands.

58 poles front by 465 poles in depth, containing about 160 superficial acres. One of these lots was numbered 16, and the acting commissioner of the General Land Office says, it is reserved for the use of schools in that township. That it is not exempted from sale under the general laws reserving the 16th section in every *township* from sale for the use of schools, is certain; for they apply to whole townships, and probably to those surveyed in square sections only.

The plaintiff says the title has been annulled, and if this lot is not reserved under the general law, her counsel say it has been selected under the act of Congress of May 20th, 1826, entitled "an act to appropriate lands for the support of schools in certain townships and fractional townships, not before provided for;" 1 Land Laws, 912. The second section of this act directs the secretary of the treasury in the cases provided for in the first section, to select certain quantities of land for the use of schools. In obedience to this law, the commissioner of the General Land Office by a general circular dated May 24th, 1826; 2d vol. Opinions and Instructions relative to Public Land, p. 395; directed the different registers of the Land Offices to cause selections to be made of the land to which each township or fractional township was entitled and to forward a list of such selections (designating numbers, &c.,) as should be made, to him, to be submitted to the secretary of the treasury for his approbation. In this case it does not appear that any such selections or lists have been made and forwarded for approval, or that the lot in question was ever selected under the act of Congress. It was not reserved from sale unless selected under the law, and the commissioner does not say it was. From the expression he uses in his letter, we infer it was not, though there is no certainty about it.

The annulling of the certificate by the acting commissioner of the General Land Office, the plaintiff says is an eviction and entitles her to demand a rescission of the sale and a judgment for the $1000, and a return of the out-standing notes. The defendant's counsel denies the sale and certificate is void

WESTERN DIS. *October*, 1841.

BARTON'S EXECUTRIX *vs.* HEMPKIN.

and annulled, and further denies the power of the acting commissioner of the General Land Office to cancel and annul it. He also denies the authority of Mr. Moore to act in the matter.

The act of Congress of the 4th of July, 1836, reorganizing the General Land Office, gives the commissioner a general supervision and control in relation to all public and private land claims, sales and patents, under the direction of the President of the United States; 1 vol. Laws, Opinions and Instructions relating to Public Lands, p. 552, sec. 1. The same authority was invested by previous laws; 1 Land Laws, 609. The second section of the above recited act, says, the President with the assent of the Senate, shall appoint two subordinate officers, one of whom is the principal clerk of the public lands and the other the principal clerk of private land claims, and in case of vacancy in the office of commissioner, or the sickness or absence of that officer, his duties shall be performed *ad interim*, by the principal clerk of the public lands. He is therefore an officer known to the law, and we are bound to recognize him and presume he is acting in obedience to the law. The supervision which the President has under the act reorganizing the General Land Office he charged the secretary of the treasury with, by a special order, dated on the same day the law was approved; 2 vol. Opinions and Instructions, 103, 104; so that all the operations of the General Land Office are under the immediate supervision of the secretary of the treasury, subject to the supervision of the President, whose duty it is, to see the laws are faithfully executed.

The chief clerk in the General Land Office, being designated by law to act as commissioner in case of vacancy, &c., he is therefore an officer known to the law, to be recognized as such and presumed to be acting in obedience to the law.

The 7th section of the act directs how documents and papers are to be certified under seal, to be used as evidence in courts of justice.

On the trial of this cause the defendant objected to the introduction as evidence of the letter of the acting commissioner of the general land office, on the grounds that no such officer was known to the law, and that he was not vested with power to cancel the certificate in question, the decision of the regis-

ter and receiver being final in the matter. The objections were overruled, and we believe correctly, though there was another objection which, if taken, might have been more serious. The District Judge correctly held the acting commissioner was an officer known to the law, and that the second objection went to the effect of the evidence.

Registers and receivers are to decide on the facts and sufficiency of proof in cases of pre-emption, when no fraud exists; but if they sell land excepted from, or not subject to sale by law, their acts are void for want of authority.

Registers and receivers are the judges of the facts in cases of pre-emptions, so far as to decide upon the sufficiency of the proof, where no fraud exists, or is alleged, but if they sell land excepted from or not subject to sale by law, their acts are void for want of authority, and the commissioner of the general land office may at least suspend, if not annul titles granted by them, until congress or the courts can act on them. 2 Opinions and Instructions, 39, 84, 140, 214; 13 Peters 498; 13 La. Rep. 24; 11 Idem 587; Guidry vs. Woods, *ante*, 334. If the evidence were before us, that the lot of land in question was reserved from sale for the use of schools under the general laws, or the particular provisions of the act of congress of May 20, 1826, we should not hesitate to decide upon it; but we do not think the mere letter of the commissioner of the general land office is sufficient. We wish to see whether this lot was selected by the register of the land office; at what time and in what manner the selection was made, and approved by the secretary of the treasury.

The commissioner of the general land office may at least suspend, if not annul titles granted by the register and receiver, until congress or the courts can act on them.

The mere statement of the commissioner of the general land office, that he has cancelled a certificate of purchase given by the register, &c., is not an eviction, which should rescind a sale between third persons.

We do not consider the mere statement of the commissioner of the general land office, that he has cancelled a certificate, an eviction which should rescind a sale between third persons. The United States has not disturbed the plaintiff in the possession of the land, the purchase money has not been yet refunded, and the act by no means complete. It may be, there will be no disturbance, and it is possible that congress, upon a representation of the facts, and proof of the good faith of the parties, would pass an act affirming the sale. Many similar purchases have been ratified, as the journals and acts of that branch of the government will show. This court have on various occasions decided that acts and proceedings much

more potent than the act alleged in this case, did not amount to an eviction. 7 Martin N. S. 272; 3 La. Rep. 490; 3 Martin N. S. 111; 1 Idem 475; 8 Idem 330; 7 Idem 96; 16 La. Rep. 501.

The case in 17 La. Rep. 446; differs from this in a very important point. The plaintiff in that case only sold his *pretensions* to a tract of land, which both parties knew at the time did not belong to him, the legal and equitable title being in the United States: but in the present case, the officers of the United States have given such a certificate as to show a *prima facie* title out of the government; 10 La. Rep. 159; 11 Idem 322; and such as would have entitled the party to a patent, but for some intervening obstacle. In the first case no title passed, in this, there is a title which is perhaps void, but we cannot take the mere *ipse dixit* of the commissioner of the general land office that it is so.

In this case there is a final judgment for the defendant upon the verdict of the jury, which we think incorrect. The plaintiff has not made out such a case as will entitle her to recover, but we think the door should be left open to a further investigation of the matter. The action is premature, but the judgment should not be final.

The judgment of the District Court is therefore annulled and reversed, the verdict of the jury set aside, and a judgment of non-suit rendered against the plaintiff with costs in both courts.

BARTON'S EXECUTRIX *vs.* HEMPKIN.

ON AN APPLICATION FOR A RE-HEARING.

Where the plaintiff failed to make out her case by full proof, the court on consideration, set aside the non-suit and remanded the cause for a new trial.

Downs, for the plaintiff, applied for a re-hearing. He urged upon the court to change the judgment from one of non-suit, and allow the case to be remanded for a new trial.

Garland, J. delivered the opinion of the court.

Upon further consideration of the judgment rendered in this case, and upon the application for a re-hearing made by the plaintiff, the court is of opinion, the justice of the case will be promoted by setting aside the judgment of non-suit and remanding the cause for a new trial.

The judgment of the District Court is therefore annulled, and the verdict of the jury set aside as heretofore ordered; the judgment of non-suit set aside, and the cause remanded to the District Court for a new trial, to be proceeded in according to law, the defendant and appellee paying the costs of this appeal.

WESTERN DIS. *October*, 1841.

TAYLOR, GARDINER & CO. *vs.* WOOTEN.

TAYLOR, GARDINER & Co. *vs.* WOOTEN.

APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT FOR THE PARISH OF CALDWELL, THE JUDGE OF THE FIFTH PRESIDING.

Where a commission is charged for *accepting*, none can be claimed, or a like commission charged for advancing, on the same sum or transaction.

A promise by defendant to send plaintiffs his crop, or in default, to allow them a commission on its amount, having no other consideration than the acceptance of a draft, for which a commission is already charged and allowed, is a *nudum pactum*, and will not be enforced.

This is an action on the following merchant's account against a cotton planter:

"MR. R. G. WOOTEN.

To TAYLOR, GARDINER & Co. Dr.

1840.			
February.	To your draft in favor of J. N. Cardozo, due 10th May,.....	$191	22
"	" commission, 2½ per cent. for accepting same,.....	4	78
"	" commission, 2½ per cent. for advancing,	4	78
1841.			
March.	" interest, 405 days,.....	21	52
"	" commission as per agreement 11th February last, on 100 bales cotton, say value $3500, at 2½ per cent.,.....	87	50
	"Amount due Taylor, Gardiner & Co. in cash on the 1st April,.....	$309	80

"New Orleans, March 4th, 1841."

The agreement between plaintiffs and defendant is embodied in the opinion of the court. In this the latter agreed to send his crop to the plaintiffs, in consideration of the acceptance of the small draft contained in the account sued on. He failed to comply, and a commission of 2½ per cent. is charged on the supposed amount and value of his crop.

There was judgment for the amount of the account sued on, and the defendant appealed.

Copley, for the plaintiffs.

McGuire, contra.

Martin, J. delivered the opinion of the court.

The defendant is appellant from a judgment, in which the plaintiffs recovered "$191 22, the amount of a draft acccepted and paid by them; also $9 56, being 2½ per cent. for accepting, and 2½ per cent. for advancing on said draft; and the further sum of $87 50, being 2½ per cent. commission on $3500, the value of 100 bales of cotton."

The defendant having occasion for the plaintiffs' acceptance of a draft of his for a small amount, entered into the following agreement with them:

"*New Orleans, February* 11, 1840.

"In consequence of Taylor, Gardiner & Co. granting me an acceptance this day for $191 22, at 90 days date, in favor of A. Cardozo, I hereby bind myself to ship to them my next crop of cotton, say 100 bales, and in default thereof, to pay them the commissions, that would accrue on said sales,"

"R. G. WOOTEN."

The plaintiffs in their petition claim all the items which were allowed in the judgment; and the further sum of $21 52 for interest.

It appears to us the court erred. The plaintiffs were entitled to the amount of the draft, and a commission of 2½ per cent. thereon, for their acceptance. The commission of 2½ per cent. for *advancing* was improperly allowed. There was *no consideration* for the allowance of a commission on the crop of cotton, which the defendant engaged to send to the plaintiffs for sale; as no cotton of the defendant was sold under the agreement. The promise to send them cotton, or in default to allow them their commissions, had no other consideration than the acceptance of the draft by them; and for this they have

Where a commission is charged for *accepting*, none can be claimed or a like commission charged for advancing, on the same sum or transaction.

WESTERN DIS. *October*, 1841.

TAYLOR GARDINER & CO. *vs.* WOOTEN.

charged, and the judgment allows them, a commission of 2½ per cent. The promise was therefore *nudum pactum*. In the case of Harrod et al. vs. Constance, 5 Martin, 575, we held, that neither law or custom allows the charge of a commission on a crop not sold by the merchant, but which he expected would be sent to him in consequence of advances made to the planter.

A promise by defendant to send plaintiffs his crop, or in default, to allow them a commission on its amount, having no other consideration than the acceptance of a draft, for which a commission is already charged and allowed, is a *nudum pactum*, and will not be enforced.

It is contended, that in the present case the commission is charged in consequence of the defendant's promise to pay it, if he did not send his cotton to the plaintiffs for sale; and as a compensation for a breach of his promise to send it. We have already said, that the promise being without consideration, cannot support an action.

As to the charge of interest in the account, the lower court has disallowed it, and the plaintiffs have not prayed the amendment of the judgment in this respect. See the case of Segond vs. Thomas, 10 La. Reports, 295.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and proceeding to give such judgment as in our opinion should have been rendered in the court below: It is ordered, adjudged and decreed, that the plaintiffs do recover from the defendant the sum of $191 22, with 5 per cent. interest from the 6th of April, 1841, (La. Code, art. 1932,) until paid; and $4 78 commissions for accepting draft; the plaintiffs and appellees paying the costs of the appeal.

ZOLLIKOFFER vs. BRIGGS, LACOSTE & CO.

APPEAL FROM THE COURT OF THE NINTH DISTRICT, FOR THE PARISH OF CONCORDIA, THE JUDGE THEREOF PRESIDING.

A slave held by a deed of trust or mortgage, which is not recorded in this State, to which the slave is removed, is liable to seizure by a creditor of the original owner.

Slaves held under a sale with the equity of redemption existing, are not liable to the seizure of a creditor of the original owner. He can seize only the equity of redemption.

This case commenced by injunction, The plaintiff alleges he is the owner of two slaves, named Sam and Eps, which he had conditionally sold in Mississippi, to A. & A. Clark, who failed to make payment, and he took them back and brought them to the Parish of Concordia, in Louisiana; and that he holds another slave named Manuel, under a deed of trust, from A. & A. Clark of Mississippi, which is also, with his other slaves in Concordia. He avers that the defendants have seized said slaves under a judgment they obtained against the Clarks, and as their property. He further alleges he has good and valid titles, and right to hold said slaves. He prays for injunction, and that they be decreed to belong to him.

The defendants pleaded the general issue, and prayed that the injunction be dissolved with damages, interest and costs.

Upon all the testimony adduced in support of the pretensions of the respective parties, there was judgment perpetuating the injunction, and confirming the plaintiff therein, in his title to the slaves. The defendants appealed.

Farrar, for the plaintiff.

Stacy, for the defendants and appellants.

Bullard, J. delivered the opinion of the court.

The plaintiff alleges that he is the owner of two slaves, *Sam* and *Eps*, having brought them to the State of Mississippi in September, 1836, with good and sufficient titles. That in Fe-

WESTERN DIS *October*, 1841.

ZOLLIKOFFER *vs.* BRIGGS, LACOSTE & CO.

bruary, 1837, he agreed to sell them conditionally, to Angus Clark and Archibald Clark. That at the time of delivering said slaves, the Clarks executed a written agreement by which they bound themselves to deliver to him an accepted draft on some good solvent commission merchant, for about $3100, whereupon the petitioner was to make a good and valid bill of sale for said slaves, but in the failure to furnish the draft, the two slaves were to be delivered back to the petitioner. He alleges that the draft was never given, and no bill of sale ever executed. The petitioner further alleges, that on the 10th of January, 1839, the Clarks, at the request of the petitioner, delivered into his possession the said slaves *Eps* and *Sam*, and that he innocently and ignorantly destroyed the aforesaid written agreement, and in the hope and belief of confirming to himself the title to the aforesaid slaves, he obtained from the Clarks a bill of sale of the two slaves. That on the delivery of the slaves to him, on the 10th of January, 1839, he brought the slaves to the parish of Concordia, and put them upon a cotton plantation which he had rented. That afterwards he employed Angus Clark as overseer upon said plantation. He further represents that he has a lien or mortgage on a slave named Manuel, by virtue of a deed of trust executed in the State of Mississippi, on the 21st February, 1837, between Angus Clark, Archibald Clark and his wife, of the first part, John Stewart of the second part, as trustee, and the petitioner duly acknowledged before a justice of the peace and recorded in the office of the Probate Court. That the deed of trust was made to secure the payment of a promissory note for $6450, dated February 21, 1837, and payable on the first of November following, to the petitioner, which note is yet in his possession, and a great part of it yet unpaid. That on the same 10th of January, 1839, the Clarks delivered to him the negro Manuel, and that he removed him to the parish of Concordia with the others, that they remained in his possession on the plantation rented by him, from the time of their removal until March, 1840. He further represents, that notwithstand-

ing the premises, the sheriff of the parish of Concordia had seized and taken into his possession the said slaves, by virtue of a writ of attachment at the suit of Briggs, Lacoste & Co., against Angus Clark, and also on an order of seizure and sale. He therefore prays an injunction, which was accordingly granted. The defendants deny these allegations, and pray the dissolution of the injunction to stay proceedings on their judgment against Clark, and for damages,

It appears that the defendants have a judgment which they recovered in the State of Mississippi, against Archibald and Angus Clark, and others, upon which they took out executory process here, and it was levied upon the three slaves in question. The only inquiry therefore is, whether Clark had such an interest in the slaves as could be seized in execution.

A slave held by a deed of trust or mortgage which is not recorded in this State, to which the slave is removed, is liable to seizure by a creditor of the original owner.

With respect to the slave *Manuel*, the plaintiff does not allege in his petition that he is the owner, but only that he has a lien or mortgage by deed of trust executed in Mississippi. It is not shown, nor even alleged that the evidence of this lien has ever been recorded in this State. Without such registry we have uniformly held, it cannot have effect in this State, against creditors. 8 Martin N. S. 222; 4 La. Rep. 42; 6 Idem 401.

The condition of the other two, *Eps* and *Sam*, is left rather equivocal by the evidence in the record. Archibald Clark was examined as a witness, and acknowledged that some of the slaves, at least which he had conveyed to Zollikoffer, were conveyed for the purpose of covering them from the pursuits of creditors, and particularly these defendants. The plaintiff alleges that he had sold those two slaves, but that not being paid for them, they were given back, and a written conveyance executed to him by the Clarks, and that deed is in the record, bearing date January 16, 1839. The evidence, and particularly the testimony of Archibald Clark shows that these two slaves in common with several more, were subject to be redeemed on the payment of the debt for which they were conveyed, about $10,000; and that a considerable part has

WESTERN DIS. October, 1841.

BRIGGS, LACOSTE & CO. vs. CAMPBELL.

been paid. It is certain they were employed by one of the Clarks in raising a crop, the proceeds of which went to redeem the slaves, and in that way between five and six thousand dollars were paid. It appears to us therefore, that Clark, the judgment debtor, had such an interest in these slaves as might be attached or seized by his creditors. The equity of redemption in the slaves is clearly a property belonging to Clark which his creditors might seize, although Zollikoffer could not be disturbed in his possession until the slaves were entirely redeemed by a repayment of the price.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court so far as it relates to the slave *Manuel*, be avoided and reversed and the injunction dissolved: and that as to the two slaves, *Eps* and *Sam*, the injunction be maintained, and the said slaves be restored to the plaintiff's possession, without prejudice to the right of the defendants to seize the equity of redemption in said slaves, belonging to Clark, and that the defendants pay the costs of this appeal.

BRIGGS, LACOSTE & Co. vs. CAMPBELL.

APPEAL FROM THE COURT OF THE NINTH DISTRICT FOR THE PARISH OF CONCORDIA, THE JUDGE THEREOF PRESIDING.

The certificate of the clerk of a court cannot be taken as proof of *the purport* of papers of record in his office, much less of such as are missing.

Remedial statutes have no extra-territorial operation.

The interpretation of contracts depends upon the foreign law; but the remedies by which the obligation resulting from contracts are sought to be enforced, must be according to the forms of the place where the remedy is sought.

This is an action on a judgment obtained in Mississippi against the defendant and others for $1828 93, with 8 per cent. interest from the 17th May, 1838. This suit is by attachment against certain slaves, sent by Lewis Campbell to the parish of Concordia. The plaintiffs pray, that their judgment be made executory, and that the slaves attached be seized and sold, to satisfy their demand.

The defendant pleaded the general issue and denied, that he was in any way liable for said judgment according to the laws of Mississippi. He set up certain matters as a special defence under said laws, and prayed the dismissal of the plaintiffs' suit.

There was a judgment dissolving the attachment; the district judge being of opinion, that the plaintiffs failed to make out their case. From this judgment they appealed.

Stacy, for the plaintiffs and appellants.

A. N. Ogden & McWhorter, for the defendant.

Bullard, J. delivered the opinion of the court.

This action, which was commenced by attachment, the defendant being a resident of the State of Mississippi, is founded upon a judgment recovered in that State against the defendant and others *in solido*.

The defendant pleads, that the pretended judgment was recovered under a statute of the State of Mississippi, passed in 1837, of which a certified copy is produced. That it appears, that said judgment was founded upon a promissory note drawn by Archibald Clark, and endorsed by this defendant and others. He alleges, that he endorsed the note as surety and for the accommodation of Clark, and that according to the laws of that State, and particularly the statute thus set forth, the plaintiff is not entitled to enforce said judgment against him, unless upon the affidavit of some credible person, made and filed among the papers in the cause, in the court in which the judgment was

WESTERN DIS. *October*, 1841.

BRIGGS, LACOSTE & CO. *vs.* CAMPBELL.

rendered, setting forth, that the principal in said note had no property in the State of Mississippi, out of which the money could be made; and he avers, that no such affidavit has ever been made. He further avers, that the plaintiff took out execution, and placed it in the hands of the sheriff, who levied on some property of Clark, sufficient to satisfy the judgment, by which levy the defendant avers, he is discharged from said judgment. He therefore prays to be dismissed, &c.

There was judgment for the defendant, and the plaintiffs have appealed. The plaintiff gave in evidence a record showing, that he had recovered the judgment sued on.

It appears by a bill of exceptions taken by the plaintiffs, that the court admitted in evidence a document marked F., purporting to be an exemplification of a record in the high Court of Errors and Appeals for the State of Mississippi, notwithstanding the objection, that it appeared upon its face to be defective and incomplete, and to contain a transcript of only a part of the proceedings had in the suit, in Madison county, State of Mississippi, and the certificate of the clerk as to the substance of other proceedings, without proof of a loss of any part of the record. We think the court erred. A mutilated record is clearly inadmissible, and we cannot take the certificate of the clerk as proof of the purport of papers of record in his office, much less of such as may be missing. 1 Martin, N. S., 522; 18 La. Rep., 33.

The certificate of the clerk of a court cannot be taken as proof of *the purport* of papers of record in his office, much less of such as are missing.

It only remains to enquire, whether the plea of the defendant, that the plaintiffs cannot maintain this action on the ground that according to the laws of Mississippi, where the note was made and the original judgment rendered, the plaintiff was not authorized to enforce the judgment, recovered in that State, against him, unless upon affidavit, that the money could not be made out of the property of the principal obligor, was properly sustained.

The act of the legislature of the State of Mississippi entitled "an act to amend the laws respecting suits to be brought against endorsers of promissory notes," upon which the de-

fendant relies, is before us. The first and second sections direct the manner and plan in which actions against drawers and endorsers of bills of exchange and promissory notes shall be brought. The third section declares, that no plea but that of non-assumpsit shall be required upon the merits, and that all matters of defence may be given in evidence under said plea. The statute further provides, that duplicate writs shall issue to the several counties, where the various defendants may reside, and the names of the drawers and endorsers, particularly specifying the first, second and third endorsers, shall be endorsed upon the writs. The statute further makes it the duty of the sheriff, to make the money out of the drawer or drawers, acceptor or acceptors, and in no case shall a levy be made on the property of any security or endorser, unless on affidavit filed among the papers, setting forth, that the principals have no property in the State, out of which the plaintiff can make his money and costs.

These are all the provisions of the act, which it is necessary to recite, as having any relation to the present case. It is incontestable, that the extent of liability incurred by the defendant in endorsing the note upon which judgment has been rendered in Mississippi, and the construction of the contract entered into by him, are to be ascertained and determined by the *lex loci contractus*. But the statute relates altogether to the remedy which the creditor may pursue in the courts of that State; and with respect to remedial statutes, it is equally well settled, that they have no extra territorial operation. That the interpretation of contracts depends upon the foreign law, but the remedies by which the obligation resulting from contracts, are sought to be enforced, must be according to the forms and regulations of the place, where the remedy is sought, the *lex fori*. 11 Martin Rep., 730; 12 ditto, 475; 1 N. S., 202; Story's Conflict of Laws; 5 N. S., 585; 6 La. Rep., 676.

Remedial statutes have no extra territorial operation.

The interpretation of contracts depends upon the foreign law; but the remedies by which the obligation resulting from contracts, are sought to be enforced, must be according to the forms of the place, where the remedy is sought.

The court therefore erred, in our opinion, in sustaining the plea and giving judgment for the defendant.

It is therefore adjudged and decreed that the judgment of

WESTERN DIS. October, 1841.

CRISWELL vs. SEAY ET AL.

the District Court be reversed; and proceeding to render such judgment as ought, in our opinion, to have been given below, it is considered by the court, that the plaintiffs recover of the defendant $1828 93, with interest at eight per cent. from the 17th of May, 1838, and costs of both courts.

CRISWELL *vs.* SEAY ET AL.

APPEAL FROM THE COURT OF THE SEVENTH DISTRICT, FOR THE PARISH OF CATAHOULA, THE JUDGE OF THE FIFTH PRESIDING.

The capacity of the donor to give, in relation to donations *mortis causâ*, reference must be had to the time of the donor's death, because it is not until then that the donation takes effect.

So where the husband, having then two children, makes a donation or disposition *mortis causâ*, in his marriage contract of all the property of which he may die possessed, and which he may lawfully dispose of, to *his intended wife*, if she survives him; and his children die first, leaving no forced heirs, at his death *his wife becomes his universal donee*, and is entitled to his estate.

This is an action by the surviving wife to recover from the collateral heirs of her deceased husband, all the property of his estate and of which he died possessed. She claims to be his universal donee, in virtue of a disposition *mortis causâ*, made to her in the marriage contract in case she survived him of all his estate and which he might legally dispose. She shows that he died without any forced heirs, and that she is entitled to his estate under their marriage contract.

The defendants claim as the heirs-at-law of the deceased, being nephews and neices. They also allege that the donation is *contra bonos mores* and null.

There was a judgment for the plaintiff and defendants appealed.

Phelps, for the plaintiff and appellee, relied on the following articles of the La. Code, 2305 to 2316, 1730 to 1732, and 1736 to 1739.

2. The capacity of the donor to be tested by his situation at the time of his death; La. Code, 1745–46, 1489.

Hyams & Purvis, for the defendant, insisted that the marriage contract although legal in its form, carried within it the seeds of its own reprobation and destruction. The donation was a nullity at the time it was made. It is expressly prohibited. Whatever is done contrary to a prohibitory law is null; La. Code, 11, 12, 19; Idem, 1745–6–7, 1743.

2. The capacity of the donor is to be governed by his condition at the making of the contract. Then he had children living, who were his forced heirs.

3. He could only give a fifth in usufruct; Sirey, 1098.

4. The donation is *contra bonos mores*; La. Code, 188; 17 La. Rep., 129.

Morphy, J. delivered the opinion of the court.

This is an action brought to obtain possession of the estate of the late Rezin Criswell, the plaintiff's husband, which was decreed by the Probate Court of Catahoula to belong to her as universal donee of the deceased. The answer admits that defendants were in possession of the property sequestered by the sheriff at the plaintiff's suit, and avers that they are entitled to it being the nearest collateral relations of the deceased, whose brother's children they are; it further alleges that the universal donation under which plaintiff sets up title to this property is *contra bonos mores*, prohibited by law and absolutely null and void. There was a judgment below for plaintiff, from which the defendants have taken this appeal.

As all the defendants were not parties to the decree of the Probate Court recognizing plaintiff as universal donee, and as

those who did appear before that court acted in the capacity of creditors in an application for the administration of the estate of the deceased, it is proper that we should pronounce on the issue placed before us without reference to the said decree.

The statement of facts shows that the plaintiff and Rezin Criswell were married on the 20th of August, 1840, that he died on the 20th of October following; that by his first marriage he had three children who survived their mother; that Isabella Criswell, one of them, died a short time before R. Criswell's last marriage with plaintiff; that the other two died after the second marriage but before their father; that Rezin Criswell left no ascendants or descendants; that the negroes found in the succession of Rezin Criswell (except Dan Johnson) named in the plaintiff's petition were the property of Rezin Criswell's first wife; that he inherited the same from his said children of the preceding marriage; and that all the remaining property found in his succession was acquired by Rezin Criswell after the death of his first wife and previous to his second marriage; that the marriage contract under which plaintiff claims as universal donee of R. Criswell, was executed on the day of her marriage with the deceased but before its celebration. Such are the material facts agreed upon by the parties; the clause in the marriage contract out of which this controversy grows, is in the following terms: "It is mutually agreed and stipulated by the parties that each gives, makes over and donates to the other, all the property of whatsoever kind and description, he or she may die possessed of, to go to the survivor of the marriage, and which may lawfully be given by act of donation, according to the laws of Louisiana; that is to say, the said Rezin Criswell gives, grants and donates to the said Mrs. Keturah Hollis (in the event of Mrs. Hollis being the survivor) all his property of every kind whatever, that he may die possessed of and which he is or may be entitled by law to dispose of *mortis causâ*, and which portion will be determined by the number of heirs that he may leave at his decease. The

said Mrs. Hollis on her part gives, grants and donates to the said Rezin Criswell, in the event of the said Criswell's being the survivor, all the property of every kind and description whatever, that she may die possessed of, under the same restrictions and reservations above specified."

This clause of her marriage contract, under which plaintiff claims has been assailed on various grounds. It is urged that by article 1745 of the Louisiana Code, Rezin Criswell, having two children of his first marriage alive, could donate to plaintiff only the lost child's portion and that only as an usufruct and that in no case could the portion of which she might have the usufruct exceed the fifth part of the donor's estate; that as at the date of this donation the deceased had no capacity to give nor the plaintiff any to receive more than that fifth in usufruct, the disposition is null and void, as made in contravention of a prohibitive statute. In donations *mortis causâ*, the rule is well settled that in order to determine on the capacity to give or to receive, or on the validity of a disposition in relation to its amount, reference must be had to the time of the donor's death, because it is not until then that the donation is to take effect; La. Code, arts. 1455, 1459; 5 Touillier, No. 90. Having left no forced heirs, the universal donation made in favor of plaintiff is as valid as if it had been made in favor of a stranger; La. Code, 1739; had he left forced heirs, the donation would have been reducible, not void; Idem, 1491; 6 La. Rep., 387; 5 Touillier, No. 867. The restrictions imposed on the husband's liberality towards his second wife being entirely for the benefit of the children of the first marriage, none but them can complain; if they all die before the donor, the invalidity of the universal donation vanishes. Toullier in his commentary upon article 1098 of the Napoleon Code, which is nearly similar to ours, says, "The donation made to the second wife or husband will not be subject to reduction, if all the children of the preceding marriage should die a natural or civil death before the donor; for it is only at his death that the revocation can operate. The prohibition was made in favor

The capacity of the donor to give, in relation to donations *mortis causâ*, reference must be had to the time of the donor's death, because it is not until then that the donation takes effect.

WESTERN DIS. *October*, 1841.

CRISWELL *vs.* SEAY ET AL.

of those children only; it ceases then if they do not exist at the time when the law would produce its effect and come to their aid;" 5 Idem, No. 878. It is said that a mutual and reciprocal donation by marriage contract being irrevocable, it must form an exception to the rule that in donations *mortis causâ* the capacity to give must exist only at the death of the donor; this appears to us a *non sequitur;* the irrevocability of mutual donations *mortis causâ* contained in marriage contracts is a feature which distinguishes them from similar dispositions made in a last will; the latter can be revoked and changed at any time before the donor's death, whilst the former cannot, but this circumstance does not change or alter in other respects the character of the donation which is nevertheless *causâ mortis* and is to take effect only at the opening of the donor's succession. We are therefore of opinion that the children of Rezin Criswell having died before him leaving no other heir than their father, all their property became his, and was at his death as much his as any other property he then owned, and was included in the donation to plaintiff; 7 Martin, N. S., 665. From the terms of the donation it is evident that the deceased intended to give only what would lawfully belong to him at the time of his death and what the law permitted him to dispose of in favor of the donee; how then can it be said that the disposition is void as contrary to any prohibitory law. But it is further contended that the contract is in contravention of good morals and the policy of the law. That it makes the fortune of the second wife depend on the death of the children of her husband; that if they lived, the law made her poor, and if they died the contract made her rich; if considerations of this kind could have the weight and effect contended for by the appellants' counsel, every universal donation or legacy must be declared null; for in every case it will be the interest of the universal donee or legatee that every person from whom the donor or testator is to inherit property should die before him, in order that his estate may be thereby increased. There are a variety of situations in life which may excite in the bosom of

the avaricious secret and criminal wishes and desires, but because a contract may be calculated to create such evil workings in the human breast, we do not feel ourselves authorized to declare it null as contrary to good morals, when it is not reprobated by law in express terms but on the contrary is sanctioned by its provisions; La. Code, 1736, 1737, 1738, 1739, 1045; 15 La. Rep., 562, and the authorities there quoted.

It is therefore ordered, that the judgment of the District Court be affirmed with costs.

DAVIS *vs.* POLICE JURY OF CONCORDIA.

APPEAL FROM THE COURT OF THE NINTH DISTRICT FOR THE PARISH OF CONCORDIA, THE JUDGE THEREOF PRESIDING.

Evidence not pertinent to the issue may be admitted, and the effect of it be afterwards considered.

In a claim for right of ferry, evidence is admissible to show, the land purchased was not worth the price paid, without the right of ferry attached to it. The effect of it should be weighed with other circumstances.

Where the claim to a right of ferry depends on a condition, evidence should be received to show the condition has not been performed.

The certificate of the commandant, stating that a certain road was made, as required by the condition of a grant of the right of ferry, is not conclusive, but only *prima facie* evidence of the fact, which may be contradicted.

Evidence is admissible to show that a ferry, which is claimed under an exclusive grant from the Spanish government, was in fact kept under the control and supervision of the Police Jury.

Instruments, such as grants, certificates, &c., are admissible in evidence, without proof of the signatures. They are *prima facie* evidence; and may be contradicted by showing, that they were not acting in the capacity they purport.

The transfer of a grant or privilege may be proved by comparison of handwriting, when the signature of the witness is shown to be genuine, and he is dead.

WESTERN DIS. *October*, 1841.

DAVIS vs. POLICE JURY OF CONCORDIA.

This suit commenced by injunction. The plaintiff alleges, that on the 19th February, 1801, the Marquis de Casa Calvo, then governor general of the province of Louisiana, granted to one Thomas Thompson, then a resident of Concordia, the perpetual privilege of keeping a ferry across the Mississippi river at the post of Concordia, as a privilege attached to his plantation; and on condition that he would clear and open a certain public road or highway from the post of Concordia to the bayou Crocodile, in the district of Concordia.

The plaintiff further alleges, that Thompson fully performed the condition of his grant by making said road, and enjoyed all the privileges and emoluments of said ferry until the 16th Oct., 1803, when he sold and transferred them to J. Vidal, for $4000, when the whole would not have been worth $800 without said ferry and the privileges thereto attached. That Vidal continued to own, possess and enjoy said ferry with its privileges and the plantation, until in the year 1817 they were sold and transferred to this petitioner, who has continued to own and possess them. He expressly alleges, that he has the exclusive right to keep a ferry across the Mississippi, according to the usages and laws of the Spanish government, for one league above and below the post of Concordia, which is also secured to him by the said grant to Thompson. He alleges, that the Police Jury of the parish of Concordia claim to exercise the right to sell or lease out said ferry in violation of his rights and grant; and that in April, 1839, they passed an ordinance to take possession, lease and sell out to the highest bidder all the privileges and rights to keep a public ferry at the place specified in his grant, and in violation thereof. He prays, that the Police Jury be enjoined from proceeding any further in said matter; that their ordinance be declared null, and that his interest in the same greatly exceeds $300; he prays for general relief, and that his rights, privileges and grant to said ferry be confirmed to him.

The defendants admitted their proceedings to take possession and sell out the ferry in question, for the benefit of the parish.

They deny the exclusive right or privilege of the plaintiff to said ferry. That if any grant was ever made, it is inoperative and null, because its terms and conditions were never complied with by the grantee; and neither the plaintiff or grantee ever exercised the rights and privileges now claimed, or kept up a ferry, therefore, if they ever had any such rights or privileges, they are forfeited by *non-user*. They aver, their ordinance is legal and valid; that the Police Jury possess the right and authority to pass it and use said ferry for the benefit of the parish. They pray, that the injunction be dissolved with $1000 damages, and that they be quieted in their rights and authority to lease out and sell the same for the parish of Concordia.

Upon these pleadings and issues the case was tried.

The plaintiff founds his pretensions on the following documents:

"MR. COMMANDANT OF THE POST OF CONCORDIA.

"Thomas Thompson with due respect represents and sayeth: that as there are are no more than 5 inhabitants now established here, we cannot incur the expenses of a road, unless the King pays us our work; and whereas his excellency the Governor has granted to Don Juan Heverard the ferry of Black River, for making a road at his *expense* from said river to the Bayou Cocodrillo: the petitioner proposes, that from the Post to Bayou Cocodrillo he will likewise make the road of 30 or 40 feet wide, at his expense, with the condition, that he may be granted to hold the ferry from his plantation to the landing of Natchez, as a privilege attached to his plantation; to which effect he promises to keep flats and other necessary boats to the purpose. This favor he expects to receive from you.

"THOMAS THOMPSON."

"Concordia, 27th January, 1801."

"HIS EXCELLENCY THE GOVERNOR.

"The proposition made by the petitioner is similar to that you were pleased to grant to Don Juan Heverard. The small number of inhabitants residing at this post, does not permit,

that they employ themselves in an undertaking so costly, unless they be compensated, as I have exposed to your excellency on this subject: considering the advantages which will result, I recommend to your excellency to grant the prayer of the petitioner, who is a person capable of fulfilling what he proposes: Providing, it may please your excellency to grant the privilege which he solicits.

"JH. VIDAL."

"Concordia, 31st January, 1801."

"New Orleans, 19th February, 1801.

"Thomas Thompson conforming himself to make the road which he proposes, at his expense, under the inspection of the Commandant of the Post of Concordia, *I grant him* the privilege he prays for, to be attached to the plantation he possesses, in order that from that place, with the exclusive privilege, he may carry on the ferry of the river; demanding and receiving only the prices most equitable and customary which may be established by knowledge of said commandant.

"EL MARQUIS DE CASA CALVO."

"Whereas Thomas Thompson has complied with the conditions which he offered in his memorial; and that he has executed under my inspection what was prescribed to him by his excellency the governor in his anterior decree, I deliver these unto him, that he may make them valuable, and possess himself of the exclusive privilege granted to him of the ferry from this Post to the landing of Natchez.

"JH. VIDAL."

"Concordia, 16th February, 1802."

This privilege or grant, so far as it attached to the plantation, was transferred from Thompson, through Vidal himself, to the plaintiff.

On the trial the defendant's counsel offered a witness to prove, that Thomas Thompson never did cut out the road to the Bayou Crocodile from the Post of Concordia, as he proposed to do in his petition to the Marquis de Casa Calvo,

for the privilege of keeping a ferry from his plantation to Natchez, which testimony was objected to on the ground, that it contradicted the certificate of Vidal, the commandant, that he had done so; that the road had been cut by said Thompson as he proposed and was required to do. The court sustained the objections, and the defendant's counsel excepted to the opinion of the court.

There was judgment for the defendants, dissolving the injunction, and that they recover $400 from the plaintiff for the use of the parish; the plaintiff appealed.

Elgee & A. N. Ogden, for the plaintiff.

Stacy, for the defendants.

Garland, J. delivered the opinion of the court.

The plaintiff alleges, that he is the owner of an exclusive privilege or right of ferry across the Mississippi river, from the place known as the post of Concordia, in that parish, to the city of Natchez. That his exclusive privilege extends one league above and below the point or place named in his grant, which is the front of a tract of land of eight arpents on the river, granted to Thomas Thompson, to whom this exclusive privilege was also granted, as one annexed to the land, by the Governor General of Spain in the province of Louisiana. This grant, he says, was made on the condition, that Thompson should clear a public road or highway from the said Post of Concordia to the Bayou Crocodile, which condition he specially alleges has been performed.

He further states, that the Police Jury of the parish have passed an ordinance directing the parish treasurer to sell at public or private sale, the exclusive privilege of keeping a ferry for a certain length of time across the aforesaid river at the same place, where his (plaintiff's) ferry crosses, which will be a great injury to him; that said parish treasurer is about to proceed to make a sale of said privilege, and will do so, unless

WESTERN DIS. *October*, 1841.

DAVIS vs. POLICE JURY OF CONCORDIA.

restrained by law. He prayed for damages and an injunction to arrest the execution of the ordinance.

The defendants admit the passing the ordinance, say it was legal and valid, and avow their intention to have it executed unless prevented. They deny any exclusive privilege of keeping a ferry was ever granted by competent authority to Thompson, and if any ever was, they say it is null and void, because the terms and conditions have not been complied with or performed by the grantee or those holding under him; and that it has been forfeited by non-user. That by the interference of the plaintiff with their just rights, they have sustained heavy losses; they ask for a dissolution of the injunction and one thousand dollars damages.

The cause was tried by a jury; there was a "verdict for defendants with $400 damages," on which the court rendered judgment, dissolving the injunction, and decreed the plaintiff to pay the four hundred dollars, from which he appealed.

The plaintiff produced as evidence the petition of Thomas Thompson, addressed to the Commandant of the Post of Concordia, representing the importance of having a road from that place to the Bayou Crocodile, and the inability of the inhabitants to make it, without their expenses being paid by the government; he therefore proposes to make a road thirty or forty feet in width, provided the privilege of a ferry from his plantation to the landing at Natchez is granted him, this privilege to be attached to the plantation. He promises, if the ferry is granted, to keep the necessary flats and boats to transport passengers, &c. The commandant Don José Vidal certifies to the governor, at the foot of the petition, the importance of the work, the inability of the inhabitants to perform it, the ability of Thompson to do what he promises, and recommends the propriety of the grant. These documents were presented to the Marquis de Casa Calvo, who on the 19th of February, 1801, says, that if the petitioner shall make the road he proposes, under the inspection of the commandant, he grants him the privilege he asks, to be attached to his plantaiion; that from

that place he shall have the exclusive privilege of a ferry across the river, demanding and receiving such tolls as shall be fixed by the commandant. It is proper to observe here, that the Marquis de Casa Calvo does not take upon himself any official capacity in this act, and the history of the province of Louisiana is silent as to his ever having been governor, unless he acted as such ex officio during the period between the death of governor Gayoso, which occurred in the summer of 1799, and the arrival of Salcedo, who was appointed military and political governor on the 21st of November, 1799; or in the absence of the latter on some occasion.

On the 16th of February, 1802, Don José Vidal, the commandant, certified, that the condition specified in the memorial had been performed under his inspection, and that Thompson was vested with the exclusive privilege granted. On the 13th of September, 1803, Thompson conveys the tract of land, without saying anything about the ferry, to Don José Vidal, in consideration of the sum of $4000 paid down, and on the 16th of October following he transfers in writing on the back of the paper purporting to grant, to the same person, all the right, title, claim and interest to the privilege granted, having, as he says, sold to him the plantation, to which the said right of ferry is annexed.

This tract of land, with the right of ferry attached, and another tract adjoining, Vidal in 1817 sold to the plaintiff, who has ever since kept up a ferry, but had the landing place on the adjoining or Vidal tract, as his immediate vendor seems also to have had.

A great deal of testimony was taken on both sides to show, Thompson had or had not used the grant, and that Vidal and Davis, his assignees, had never used it from the front of the Thompson tract, but from a point a quarter to a half mile above. Each party endeavored to exclude as much of the testimony of his opponent as possible, and both have so far succeeded as to bring the case before us in a very unsatisfactory manner, and

WESTERN DIS. *October*, 1841.

DAVIS vs. POLICE JURY OF CONCORDIA.

in such a situation as prevents us from doing justice between them, as it stands.

On the trial the plaintiff, having proved, that there had always been a ferry kept by him and Vidal, on a tract of land belonging to them, adjoining to the Thompson tract, offered to prove the public convenience was promoted by the ferry being kept at that point, which evidence the judge refused to admit, and plaintiff excepted. We think the judge erred. The evidence ought to have been admitted, and the effect of it afterwards considered. We think the judge also erred in excluding the evidence offered by plaintiff, to show that the Thompson tract of land was not worth at the time it was sold $4000, without the right of ferry. It ought to have been received, and the effect weighed with other circumstances.

We further think the judge erred, in excluding the evidence offered by defendants, to prove Thomas Thompson never did make the road from the river to the Bayou Crocodile, as stated in the certificate of the commandant. The making of that road was the consideration for the grant; the plaintiff in his petition tendered the defendants an issue on that point, in which they joined by a special denial. The plaintiff was permitted to show by the commandant's certificate the condition was performed, and the district judge was wrong in holding it to be conclusive. We think it only *prima facie* evidence, which the defendants may contradict. The commandant did not act in the matter in any judicial capacity, he was only a commissioner or superintendant, to see a particular work was executed; and no more sanctity is to be attached to his certificate, than to presume he did his duty, and told the truth; and thereby throw the burden of proving a negative on the other party.

We think the judge also erred in excluding the documents I, J, K and L offered by the defendants, to prove that, although the plaintiff had kept a ferry at the place he did, it was under the supervision and control of the Police Jury. The evidence was clearly admissible, to show an interruption or want of the prescriptive right set up by plaintiff.

The judge did not err in admitting in evidence the record books from the parish judge's office, to prove the recording of the acts therein contained, nor did he err in permitting a person, who on oath said he understood the Spanish language, to read and translate those records to him and the jury, they not understanding that language.

We further think, the judge did not err in admitting in evidence the instrument purporting to be the petition of Thomas Thompson, and the recommendation by Vidal as commandant, and the grant signed by the Marquis de Casa Calvo, without proof of the signatures. They are *prima facie* evidence. That Vidal was the Commandant of the Post of Concordia at the time, is a matter of history; that Casa Calvo was about that time an officer of high authority in a military capacity, is also known; and it is possible he may have exercised some civil function, as was frequently the case under the Spanish government; but we do not believe he ever had a commission as Governor of the province of Louisiana. Salcedo, we have stated, was appointed military and political governor in November, 1799, and he continued to be such at the time Spain transferred the province to France, on the 30th of November, 1803, on which occasion he and Casa Calvo acted as the commissioners of the King of Spain, to deliver the country. Casa Calvo then was styled a brigadier in the King's armies, &c. 2 Vol. Land Laws, Appendix I, p. 165; Idem, p. 529. This evidence being *prima facie*, the defendants are at liberty to contradict it, and may show, that the Marquis de Casa Calvo was not governor or acting as such at the time of the grant. But until some sufficient evidence is given to the contrary, we will presume an authority existed. 12 Peters, 410.

We think the judge did not err in admitting the transfer of the privilege or grant by Thompson to Vidal, to be proved by comparison, after the signature of Minor, the subscribing witness, was proved, and it was shown he was dead. Had these facts not been shown, we think the comparison ought to have been made with more than one authentic or admitted signature.

WESTERN DIS. *October*, 1841.

M'KOWN *vs.* MATHES.

O. C. C., p. 306, art. 226; L. C., art. 2241; 2 M. R., 203; 9 L. R., 521; 11 L. R., 251; 1 N. S., 486.

The judgment of the District Court is therefore annulled, avoided and reversed, the verdict of the jury set aside, and it is further ordered, that this case be remanded to the District Court, with directions to the judge to conform in the admission or rejection of testimony to the principles herein expressed, and otherwise to proceed according to law, the defendants and appellees paying the costs of this appeal.

M'KOWN *vs.* MATHES.

APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT FOR THE PARISH OF OUACHITA, THE JUDGE OF THE FIFTH PRESIDING.

Where an appeal is not clearly suspensive, it will not be dismissed on the ground of insufficiency in the amount of the bond, when it covers costs.

The authority of a deputy clerk to issue an attachment, when denied, should be clearly established by evidence.

Where the admissions and declarations of the payee and endorser of a note, that he *transferred* it to the plaintiff, are *proved* by witnesses, it is sufficient to authorize a recovery, without actual proof of his signature.

Compensation and payment must be specially pleaded to enable the defendant to make proof of either.

But an amendment setting up the plea of payment and compensation, comes too late after the trial commences and the jury are sworn.

Where it is shown that the plaintiff sues as agent, or for the benefit of the payee of a note, the maker may set up every equitable defence he may have against the payee.

Where an attachment is dissolved, it is at the costs of the plaintiff, and the judgment should so state it, although the case is tried on the merits, by the appearance of the defendant, and judgment goes against him.

This suit commenced by attachment. The plaintiff sues on a note of the defendant, payable to one James Barr, or order, and by him endorsed, for $93, and an account for work and labor done, in cutting timber, &c., amounting to $543 50, which with the note, he annexes to his petition, and prays that a large cypress raft and some other timber be attached; that he have judgment for the amount of his entire claim, to be satisfied out of the proceeds of the property attached, as the property of the defendant.

The defendant appeared, excepted to the attachment, that he was a resident of the State and not sued at his domicil, which he averred was in New Orleans.

On the merits, he pleaded the general issue; denied the plaintiff was the legal holder of the note, or that he ever gave any consideration for it; but that the suit was commenced for the purpose of harrassing and defrauding him. He prays judgment for $1000 in damages, and that the plaintiff's demand be rejected.

Upon these issues and pleadings the case was tried.

There were various orders and proceedings had on the trial, and evidence produced by the parties which is detailed in the opinion of this court.

The cause was finally submitted to a jury who returned a verdict for the plaintiff of $93, the amount of the note and costs; rejecting the account. After an unsuccessful effort by the defendant to obtain a new trial, he appealed from the judgment confirming the verdict.

M'Guire, for the plaintiff.

Downs, for the defendant.

Garland J. delivered the opinion of the court.

The plaintiff claims of defendant the sum of $93 with 6 per cent. interest, from the 2d March, 1840, due on a promissory note payable to and endorsed by James Barr, and a further sum of $543 50, on an open account. He obtained an attach-

WESTERN DIS. *October*, 1841.

M'KOWN vs. MATHES.

ment on the ground the defendant was not a resident of the State, which was levied on a raft of cypress timber and a quantity of shingles, with which the defendant was descending the Ouachita River.

The defendant excepted to the jurisdiction of the court, alleging he is a resident of the city of New Orleans, of which place the plaintiff is also a resident, he therefore asks the dismissal of the suit, because it is not brought at the place of his domicil. He also asks to dissolve the attachment:

1. Because it is not true as is alleged, that he resides out of the State.

2. Because the affidavit is insufficient, defective and illegal.

3. Because there is and was no date to the writ of attachment.

4. Because the sheriff failed to make and return in due time a specific inventory of the property seized.

5. Because no sufficient service of the attachment was made.

6. Because the person who signs his name as deputy clerk of the District Court, to the order of attachment, was not at the time such deputy, and if he was, had no authority to make any such order.

7. Because the bond is illegal in form, insufficient in amount, and the security is insufficient.

8. Because it is not true the defendant is indebted as alleged.

On the trial of these exceptions, the inferior court dissolved the attachment, but overruled the plea to the jurisdiction.

The defendant then filed an answer to the merits, went to trial at a subsequent term of the court, and judgment was given against him for $93, with interest from judicial demand and costs, which seem to amount to a large sum; from which defendant appealed.

The plaintiff and appellee moves to dismiss the appeal, on the ground the bond is insufficient in amount, as the appeal is suspensive. A reference to the petition of appeal and order

Where an appeal is not clearly suspensive, it will not be dismissed on the ground of insufficiency in the amount of the bond, when it covers costs.

on it, settles the question. The defendant does not pray for a suspensive appeal, nor does the judge allow it, so far as his order goes. He says the appeal is granted on bond and security being given in the sum of $160, conditioned as the law directs. The bond is given, with a condition that the defendant abide such judgment as shall be rendered against him. The plaintiff contends this condition makes the appeal suspensive. We think the character of the appeal can be better understood from the petition and order of the judge, and as that does not say it is suspensive, and the bond is only for $160, we think it is a devolutive appeal. The motion to dismiss is therefore overruled.

From an attentive examination of the evidence given on the trial of the exception, and motion to dissolve the attachment for the causes stated, we are of opinion the judge did not err in overruling the exception to the jurisdiction of the court and dissolving the attachment. The evidence does not establish for the defendant a domicil in this State. It is proved, whilst in New Orleans, he resides at the house of a relation, for the purpose of disposing of the rafts of timber which he procures in the swamps or on the public domain in Arkansas. The witnesses have known defendant nearly or quite as much in Arkansas as in this State. He came originally from Kentucky, and sometimes spoke of that State as his home, as he frequently did of New Orleans. The impression the whole evidence makes on us is, the defendant has no domicil any where. He is one of that floating class of traders and adventurers who are so common in our cities and towns, and on the rivers in this State, who engage temporarily in such pursuits as present an immediate prospect of gain, and depart as soon as they find those pursuits unprofitable. In the case of Williams vs. Henderson; 18 La. Rep. 557; we had occasion to examine the question of domicil particularly, and according to the principles there laid down, the defendant has no domicil in New Orleans.

Of the numerous grounds, on which the motion to dissolve

The authority of a deputy clerk to issue an attachment, when denied, should be clearly established by evidence.

the attachment was based, it is only necessary to notice the sixth, it being sufficient to sustain the decision of the judge. By that objection, the quality and capacity of the person granting the order of attachment and issuing it, is directly denied, and there is no evidence to show that Scarborough, who acted as deputy clerk was such. The process resorted to is one of much severity, and when ordered and issued by subordinate executive officers, should be closely scrutinized and their authority clearly established.

On the trial of the cause, the defendant, by his plea admitted his signature to the note sued on, but denied the plaintiff's right to it. He further alleged the note was not in plaintiff's possession when the suit was commenced, but had been since put into his hands without consideration or endorsement, for the purpose of harrassing him. The note is payable to James Barr or order, and purports to be endorsed by him. In the course of the trial of the exceptions, Barr came to the stand as a witness, and stated on his *voir dire* he was interested and was not examined. The plaintiff, for the purpose of establishing his title to the note, offered to prove by Pagan and other witnesses, that Barr, the payee, had on different occasions admitted he had endorsed the note to plaintiff. To one witness, he said, he still had an interest in the note, although he had transferred it; to another he said, plaintiff and he had been in partnership, and the note had fallen to the share of the former, and he (plaintiff) was the owner of it. To a third, he said, he had traded the note to plaintiff who had paid him for it. Did not say he had *endorsed* it, but said he had *transferred* it.

The defendant objected to the introduction of this as evidence, on the ground: 1st. It was hearsay. 2d. The admissions of the payee of a note not a party to the suit, are not evidence of transfer or endorsement. 3d. It is not a mode recognized by law to prove signatures. 4th. Because the payee is interested in the event of this suit. The District judge overruled the objections and admitted the testimony.

We are not prepared to say the judge erred. The admissions of Barr do not come within the definition of what is properly called hearsay evidence. That the admissions of the payee and endorser, that he had transferred the note, ought to be admitted, is a question of more doubt, but we cannot say, they should in this case have been excluded. The defendant had admitted his signature to the note. The plaintiff had possession of it, which is *prima facie* evidence of title and to recover, it was on y necessary to show the payee had been divested of the legal interest. The admissions of Barr did not make the obligation of the defendant more onerous. If he had have had equities against the note, he could have opposed them to the plaintiff, as the note was transferred after it was due; and as the object of proving a transfer, was to enable the plaintiff to recover and protect the defendant from any claim of Barr hereafter; his admissions will bind him in any future claim he may allege. If the witness, instead of saying that Barr had admitted he had transferred the note, had stated they had seen him write, and believed the endorsement on the note was in his hand-writing, there is no doubt it would have been sufficient, and there is but little difference in proving that he acknowledged the transfer. As a general rule, the admission of a signature only binds the party who makes the confession, but when the obligation of another party is not affected by it, we see no sufficient reason why it should be rejected. Evidence of this kind is however of the weakest character; 9 La. Rep. 562; 10 Idem, 528; 11 Idem, 139. This view of the point seems to include the other two objections made by defendant.

Where the admissions and declarations of the payee and endorser of a note, that he *transferred* it to the plaintiff, are *proved* by witnesses, it is sufficient to authorize a recovery, without actual proof of his signature.

On the trial, the defendant's counsel offered evidence to prove the defendant had loaned the plaintiff money, furnished him with provisions and tools, made him payments and advances, that plaintiff had taken shingles and timber belonging to defendant, which he had not paid for. To this evidence the plaintiff's counsel objected, on the ground that there was no plea of compensation or payment in the answer, and no such

Compensation and payment must be specially pleaded to enable the defendant to make proof of either.

But an amendment setting up the plea of payment and compensation, comes too late after the trial commences and the jury are sworn.

evidence could be admitted under the general denial, and the mere allegations that defendant did not owe plaintiff any sum. We think the judge did not err in sustaining the objections. Compensation and payment must be pleaded, to enable a defendant to make proof of either. Those pleas imply the existence of a demand, and if a party wishes to have the benefit of them he must also incur the responsibilities they impose.

After the court rejected the evidence, the defendant moved to amend his answer so as specially to set forth these payments and advances, on the ground that the justice of the case required it, and that such amendments ought to be allowed at any stage of the cause. The plaintiff objected to this, and was sustained by the court, to which the defendant also excepted. We do not think the judge erred. The issues had been made up between the parties. The plaintiff had no notice given that payment or compensation would be opposed to him, he only came prepared to prove his demand and could not be supposed, ready to go into an examination of the claims attempted to be proved. The jury had been sworn, the cause was on trial, and a considerable portion of the evidence heard when this motion was made. We think it came too late. The pleas should have been filed before, and the plaintiff thereby notified of them.

The defendant then moved the court to charge the jury, that if they should be of opinion the plaintiff was not the real owner of the note sued on, but that it really belonged to Barr and was put into the hands of plaintiff, only to enable him to obtain an attachment, then they should find for the defendant. This the judge refused, and told the jury if they found the plaintiff was the agent or holder for collection, of the note sued on, the action could be maintained and an attachment could be sued out. To this, defendant excepted. The judge was, we think, correct in his charge to the jury. The authorities that an agent may sue on a note payable to order, and endorsed in blank, are numerous; but defendant may set up all his defence against the payee in such a case as the plaintiff

is only agent, and stands in the place of the payee; 3 Martin N. S. 291, 392; 3 La. Rep. 431; 4 Idem 220, 533; 13 Idem 13.

It was also proved on the trial, that when the deputy sheriff went to attach the timber of defendant, he told him he did not owe the plaintiff any thing except the note sued on. There is a great deal of contradictory evidence in the case, the jury gave a verdict for the amount of the note and interest, rejecting the account set forth in the petition. We are not disposed to disturb the verdict and judgment thereon, as we think the jury has done substantial justice between the parties.

Where an attachment is dissolved, it is at the costs of the plaintiff, and the judgment should so state it; although the case is tried on the merits, by the appearance of the defendant, and judgment goes against him.

In examining the judgment as given by the court below, there is error in taxing the defendant with the costs of attachment, which was dissolved as we think, correctly. For all the costs relating to the issuing the attachment, and consequences of that writ, the plaintiff is responsible, it being a process distinct from the citation, and other costs incurred in the case, and the District Judge in his order dissolving the attachment should have stated it was at the costs of the plaintiff.

The judgment of the District Court is therefore affirmed in all respects, except as to the costs arising from the issuing an execution of the writ of attachment, including those costs incurred for keeping and preserving the property seized, which are to be paid by the plaintiff and appellee, together with the costs of this appeal.

WESTERN DIS. *October*, 1841.

STATE *vs.* COTTON.

STATE *vs.* COTTON.

APPEAL FROM THE COURT OF THE SEVENTH DISTRICT, FOR THE PARISH OF OUACHITA, THE JUDGE OF THE FIFTH PRESIDING.

On the failure of the accused to appear when called on the second day of the term, a judgment *ni si* only is to be entered, which may be *set aside* during the same term, on the appearance of the party accused.

So where a party accused and his sureties failed to appear on the second day of the term and a judgment was entered up against them; and afterwards, but during the term, the principal surrendered himself: *Held*, that the judgment should have been set aside on his appearance in court.

This is an appeal from a judgment on a recognizance or bail bond.

The defendant being committed on a criminal charge gave bail for his appearance at court at the April term, 1841, for the parish of Ouachita. The grand jury found a bill of an indictment for rape, and on calling out the defendant on his recognizance he failed to appear, and judgment of forfeiture was entered on the minutes in the sum of $2000, the amount of his bond. A bench warrant issued, the defendant brought in, formally arraigned, and on the part of the State, the case was continued until the next term. The defendant gave bail for his appearance accordingly.

A motion was made by the defendant's counsel to set aside the judgment of forfeiture, which was opposed by the District Attorney and the motion refused by the court. The defendant appealed.

M'Guire, District Attorney, on the part of the State.

Garrett & Downs, for the defendant.

Garland, J. delivered the opinion of the court.

The defendant being charged with a criminal offence entered into a bond for the sum of $2000, with two securities in the sum of $1000 each, the condition of which was, he should appear before the District Court of the parish of Ouachita, at the

April term, 1841, to answer to the offence with which he was charged. An indictment was found by the Grand Jury, the defendant then being in attendance; a short time after which, he wishing to return home, as he says to prepare for his trial spoke to the deputy clerk and another person of his intentions and asked their advice. By those persons he was informed that he could not be tried until three days after service of a copy of the indictment, and *venire* had been served on him. He then requested those persons to inform his counsel if he should be wanted, that he had gone home and should return on the third day afterwards with his witnesses. The next day, the District Attorney called for the defendant to arraign him, and he not appearing, his securities were called upon to produce him, which they failing to do instanter, the District Attorney moved the court to enter up a judgment forthwith for the amount of the bond, to wit: $2000 against the principal, and $1000 against each of the securities, which judgment the court gave immediately. A bench warrant was issued and the sheriff went to arrest the defendant, who was from home when the sheriff arrived at his house, but hearing that the officer was in pursuit of him, he came immediately, surrendered himself and accompanied the deputy sheriff to the court-house, where they arrived before there could in the ordinary course of business have been a trial, if the defendant had not gone away. The deputy sheriff says the defendant made no effort to escape, which he might easily have done if he had wished. As soon as the defendant arrived his securities surrendered him, and they were subsequently discharged from all liability. The defendant also showed cause and endeavored to get the judgment *ni si* set aside as to him, which the judge refused and made it final, from which he appealed.

This proceeding took place under the first section of the act of 1837, p. 98, relative to the recovery of bonds and recognizances in criminal cases. This act authorizes the District Attorney to call on a party accused of any offence, (who has given bond,) at any time on or after the second day of the

WESTERN DIS. *October*, 1841.

STATE *vs.* COTTON.

On the failure of the accused to appear when called on the second day of term, a judgment *ni si* only is to be entered, which may be *set aside* during the same term, on the appearance of the party accused.

So where a party accused and his sureties failed to appear on the second day of the term, and a judgment was entered up against them; and afterwards, but during the term the principal surrendered himself: *Held*, that the judgment should have been set aside, on his appearance in court.

term, to appear, and if he do not, and if the securities when called fail to surrender him, then the District Attorney may on motion have a judgment entered against both principal and sureties *in solidum* for the full amount of the bond. Which judgment may, during the same term of the court, be set aside upon the appearance, trial and acquittal, or conviction and punishment of the party accused, or if it is proved the party is prevented from attending by some existing physical debility.

In a very little time after the defendant returned to the court-house and was surrendered by his sureties, he was arraigned, his case was continued on his application to procure witnesses, and he gave bond and security *in solido* for four thousand dollars to secure his appearance at the succeeding term of the court. Notwithstanding all this, the district judge made the judgment *ni si* final, because the defendant was not tried at that term of the court.

We think the judge has given a too literal and rigid interpretation to the law. Its object was to secure attendance at court, of the persons accused of offences, to answer the accusations prefered against them, and should be executed in a way that will attain that object, and not to punish parties in advance. Suppose in this case, the State had not been ready for trial, and the District Attorney had applied for a continuance, according to the literal application given to the law, the defendant would have been still obliged to pay his bond, which would have been unjust. He would certainly be entitled to a release upon the ground that the prosecution was not under his control, but that of the laws of the country, and he could not prepare the cause for trial in behalf of the State. Now we are to presume, he showed sufficient cause in the District Court to entitle him to the continuance that was granted, whereby the requisites of the law were fulfilled and public justice satisfied. A citizen ought not in a criminal presecution, without some fault on his part, be put in such a situation, that he must incur a heavy pecuniary loss, or go to trial under circumstances that would almost if not completely insure his conviction.

Nearly every case has its circumstances of mitigation or aggravation, which should have their due weight in forming an opinion in relation to it. In this, we cannot see any intention to avoid a trial or to escape, on the contrary, the defendant although badly advised, seems to have been desirous of preparing for trial, and was possibly prevented from getting ready by being arrested when he was in search of his witnesses.

The judgment of the District Court is therefore annulled, avoided and reversed, and a judgment given for the defendant.

JONES *vs.* YOUNG.

APPEAL FROM THE COURT OF THE SIXTH DISTRICT FOR THE PARISH OF RAPIDES, THE JUDGE THEREOF PRESIDING.

Parties are not to be controlled in the order in which they adduce their proofs on the trial: so in the transfer of a note, the defendant may examine witnesses to prove the existence of equities between the original parties affecting the consideration, and afterwards show, that the plaintiff took the note with a knowledge of their existence.

Where the plaintiff took defendant's note endorsed in blank by the payee and before due, but with a knowledge of the equities existing between the original parties, amounting to a failure of consideration, he cannot recover.

This is an action on a promissory note, signed by the defendant the 3d February, 1836, for $1655 95, payable to the order of Stephen Tippett, and by him and others endorsed. On the 11th April, 1837, the note was transferred to the plaintiff and before it was due, by the Tippetts, subrogating him to all their rights against the maker.

The defendant pleaded the general issue; and averred, that the note was given with others for the price of a piece of land,

WESTERN DIS. October, 1841.

JONES vs. YOUNG.

from which he had been evicted by a pre-existing mortgage of P. B. Martin, and of which the plaintiff had knowledge before receiving said notes. That he has a right to offer in his defence all the equities existing between the original parties, which is a failure of consideration; and that the land for which the notes were given, was sold in the spring of 1838, to pay P. B. Martin's mortgage.

The whole matter, with the evidence in support of the defence, was submitted to a jury; the most material parts of which are recapitulated in the opinion of this court.

There was a verdict and judgment for the defendant, from which the plaintiff appealed.

Dunbar & Hyams, for the plaintiff.

Elgee, for the defendant.

Bullard, J. delivered the opinion of the court.

This is an action by the endorsee of a promissory note against the maker. The defendant pleads, that the note was given with others in part consideration of a tract of land, which he purchased of Stephen Tippett and others. That he has since been evicted of the land for which the note was given, and that the consideration has failed. That these facts were within the knowledge of the plaintiff, and he took them subject to all legal exceptions against the payee. That the transfer of the note by the payee was in fraud of his rights. That it was agreed and understood, that the note when given was to be immediately transferred to P. B. Martin, who held a prior mortgage on the land, so as to extinguish the mortgage to that extent, and give the respondent a clear title. That the note was transferred in violation of this agreement, well known to all the parties and especially to the plaintiff, and that the land has since been seized and sold under the mortgage of Martin.

The case was tried by a jury, who found a verdict for the defendant, and the plaintiff appealed from the judgment rendered thereon.

It appears from a bill of exceptions in the record, that the plaintiff's counsel, during the trial excepted too much of the testimony of Holt & Beaman, as related to any conversations between them and the defendant Young, or between them and Tippett, relative to the note sued on, unless such conversations were had in presence of plaintiff, or were communicated to him previously to the transfer of the note, and he particularly objected to evidence of any conversation between the witnesses and Tippett or Young, as to any application of the notes given by Young to the mortgage notes given by Tippett to Martin, unless such conversations were in presence of the plaintiff or communicated to him before he became the holder of the note. But the court admitted the testimony as set forth in the note of evidence, on the ground that the defendant might bring home knowledge of it to the plaintiff afterwards in the progress of the trial; and if so, then the evidence was good, otherwise not.

We are of opinion, the court did not err. It is well settled under our practice, that parties are not to be controlled in the order, in which their proofs are to be laid before the court or jury. In the present case, if the defendant failed during the trial to bring home to the plaintiff's knowledge of the equitable circumstances, before he became holder of the note, the court might have been moved to instruct the jury, that the evidence of these statements out of his presence was not legal evidence against the plaintiff.

Parties are not to be controlled in the order in which they adduce their proofs on the trial: so in the transfer of a note, the defendant may examine witnesses to prove the existence of equities between the original parties affecting the consideration, and afterwards show that the plaintiff took the note with a knowledge of their existence.

Upon the merits, it was shown upon the trial, that the note was given for an instalment of the price of a tract of land bought by the defendant of Tippett, of which he has been evicted in consequence of a previous mortgage in favor of Martin. Holt, sworn as a witness, testified, that Tippett told him he had agreed with Young, to whom he had sold a part of the land, that his notes should be transferred to Martin, to make the debt lighter or to extinguish so much of it. Tippett told him, that was his object in selling the land to Young. That was understood before the sale, and that Martin was to

take the note. The witness further testified, that in 1836 he was riding with Jones, the plaintiff, down the river, and they began to speak about the same land, and witness remarked, that he thought Tippett had acted foolishly in selling this piece of the land to Young, as he considered it the best part of the tract. Jones replied, that *Tippett had done so to make his payments to Martin easier.* Don't remember, that anything was said about the notes. That Jones and Tippett were very intimate; they had cultivated the plantation together the year before. That Tippett was a talkative and communicative man and spoke of his matters to every body, except when he was about to go to Texas. Mr. Beaman testified, that a day or two after P. B. Martin sold his property, Jones, the plaintiff, called on him to join him (Jones) in going security for Tippett to Martin for about $3000, which witness agreed to do. Jones told him, that Tippett was to place Young's notes, of which this is one, in their hands as collateral security. A day or two afterwards witness was called upon to endorse the notes for Tippett to Martin, and witness then made the remark to Jones, that he had had a conversation with Young about those notes, and that if Tippett should pay for the land he had bought of Martin, then there would be no difficulty in Young paying his notes; but if Tippett did not, there would be a difficulty in collecting the money from Young. Jones replied, that the notes given by Tippett were well secured, and that there was no danger of their not being paid. Witness further says, that he would not under those circumstances have taken Young's notes and given value for them. It is further shown, that one of the payees objected to the transfer of the note, but that she was finally persuaded to sign the act by her son, S. Tippett, and that Jones was present.

Where the plaintiff took defendant's note endorsed in blank by the payee and before due, but with a knowledge of the equities existing between the original parties, amounting to a failure of consideration, he cannot recover.

The jury concluded from the evidence adduced on the trial, that the plaintiff could not recover, on the ground, that he was informed of the equitable defence of the defendant. We do not regard this as one of the cases, in which it is our duty to disregard its verdict. The jury knew the parties and the wit-

nesses, and could better judge of the weight of evidence, than we can be. They concluded from the intimacy of the plaintiff with his transferor, and the conversations between him and Holt & Beaman, that he took the note at his peril, and that Tippett had violated his agreement to transfer the note to Martin in discharge of the mortgage.

The judgment of the District Court is therefore affirmed with costs.

ROWLEY *vs.* ROWLEY.

APPEAL FROM THE COURT OF THE NINTH DISTRICT, FOR THE PARISH OF CONCORDIA, THE JUDGE THEREOF PRESIDING.

This court will take jurisdiction of a suit for separation from bed and board, although the matter in contestation is not *appreciable in money*, or does not consist in a money demand exceeding 300 dollars.

The law expressly gives the courts jurisdiction in cases of separation from bed and board, and in actions of divorce; and this court will not hesitate to act under it, when they have not the slightest doubt of the constitutionality of the law.

Upon affidavit made, and in consideration of its being the first term, a continuance should be allowed; but if on appeal it appears, that by the admissions of the adverse party, &c., no injury is sustained by going to trial, the case will not be remanded on this account.

Living unhappily together; having frequent differences, ebulitions and displays of temper, but without any personal or other violence; the want of supplies or necessaries according to the wife's demands; the non-payment of her bills promptly, and education of her daughter; the want of support according to her rank and fortune she brought to the marriage, and supposed impossibility of the parties ever living together again, are not sufficient *cause of separation from bed and board.*

WESTERN DIS. *October*, 1841.

ROWLEY vs. ROWLEY.

Where a woman has her domicil here, and marries in another State, it does not prevent a community of acquests and gains from existing, when the parties afterwards remove to Louisiana.

In a judicial sale for a partition among several heirs, the husband of one of them may purchase the entire property sold, which becomes community property from that time; he being responsible to the wife for the price only.

Where, in a purchase by the husband, the portion of the wife in the estate sold is imputed to the extinguishment of the price to be paid by him, he is bound to her for it, with a legal mortgage to secure it, if he administers her paraphernal estate.

If the wife have a fortune, and is in the administration of it, and the husband little or none, she is bound to pay or contribute at least half of the matrimonial charges.

The wife is not entitled to interest on recovering her paraphernal property, when the husband administers it, or when it is administered indifferently by the husband and wife; as the fruits of paraphernal property, except the young of slaves belong to the community.

During the pendency of a suit of the wife for a separation from bed and board, the wife may leave the home assigned as her residence, on business, and be temporarily absent.

A judgment for alimony may be given, even when no separation from bed and board follows.

The court may, in its discretion, change the residence of the wife during the pendency of her suit for separation.

This is an action by the wife against the husband for a separation from bed and board, and also for a separation and partition of property.

The plaintiff alleges, that in the spring of 1834, being on a visit to the city of Troy, in New York, where her daughter by a former marriage was then at school, she intermarried with Charles N. Rowley, of that State, and in the latter part of the year she returned with her husband to Louisiana, where they have both ever since resided.

The petitioner shows, that at the time of marriage with the defendant, she owned and possessed an undivided third part of a large plantation and slaves, formerly the property of her ancestor, situated in the parish of Concordia, and then owned and held in partnership between her and her sister, Mrs. Sprague,

and James Kemp, her brother; her interest and share therein being $47,000; that in June, 1835, the Marengo plantation and slaves were sold to effect a partition between her and her co-proprietors, and adjudicated to the defendant, who became possesed of this large estate, from which he has ever since derived large yearly revenues.

She further shows, that her marriage with the defendant has been destructive of her own happiness and peace of mind, and deeply injurious to the interests and future prospects of her only child of her former marriage; that ever since her said marriage, her husband has pursued towards her a course of injustice and oppression, evincing a total disregard of her feelings and rights, and has been guilty of repeated acts of cruel treatment and outrage to her feelings, of such a nature and degree as to render their living together *insupportable;* that she has acted towards her husband as a faithful and dutiful wife, but has suffered for years past under the deepest distress of mind, inflicted on her by his unjust and unnatural conduct. Finding that her living any longer with her said husband would be altogether insupportable, on the 15th December last (1840) she left his domicil, with her daughter, and is now impelled to seek relief from this court.

She further shows, that when she intermarried with the defendant, she was in affluent circumstances, and he was without means; and she placed him in possession of all her fortune and property; that he has made large revenues therefrom, but has refused to her the common necessaries of life, or even the smallest sums of money for herself and daughter. She alleges and sets forth various other acts of her husband tending to her injury and degradation, and that of her daughter as additional causes of separation.

She prays for leave to institute this suit; that she have judgment of separation from bed and board; and as she is without an income, that a domicil be assigned her, with an allowance of $200 per month, during the pendency of this suit; and finally, that she be decreed separated in property, and have the

WESTERN DIS. *October*, 1841.

ROWLEY vs. ROWLEY.

possession and administration of her separate estate restored to her, with one half of the acquests and gains, and that a final partition and division be made.

The petition was sworn to, and the petitioner authorized by the judge to institute and prosecute this suit; her domicil fixed at the house of M. Debruys, in the parish of St. James, with a monthly allowance of $200, to be paid by the defendant, during the pendency of the suit.

The defendant pleaded a general and special denial of every allegation and charge in the petition, except such as were expressly admitted or modified. He regrets, that the daughter is brought into this controversy and avers he has always treated her with the greatest regard and respect, and bears willing testimony to her amiable and affectionate disposition and engaging manners. He denies having ill-treated, or being guilty of any cruelty and oppression towards the plaintiff; that since his marriage his life has been much embittered, and his peace of mind destroyed by the frequent paroxisms of her ungovernable passions, which arising from the slightest possible causes, or from no cause whatever, for a time deprive her almost of her reason: such has been her state of mind during her present and former marriage, from her peculiar cast of mind and temper, that he attributes to it the cause of all the disagreements and difficulties with both her husbands. He admits, that her general demeanor and conduct towards him have been that of a kind and affectionate wife; and so long as her mind remained calm, her conduct was praiseworthy; that he has forbore, and by gentleness endeavored to sooth her when angry and excited. He expressly avers, he has always strove to provide the plaintiff and her daughter with the conveniences and comforts of life suitable to their condition and his pecuniary means, and that her complaints are unfounded in this respect. He admits she was a frugal and industrious wife, often laboring with her hands and needle in making his clothes, and performing the duties of the household; but it was all her voluntary act.

The defendant admits, that on the 15th June, 1835, he be-

came the purchaser of the Marengo plantation and slaves for $137,500, which had been previously owned by the plaintiff and her two co-proprietors, as she has alleged; that by said purchase he became the owner of said property and its increase, and bound for the price; that there exists a community of acquests and gains. He avers, he has devoted his best energies to improve and increase the community of property; appropriating nothing to his own exclusive use or advancement of his private interests. In conclusion he denies ever pursuing towards his wife a system of oppression and cruelty, or that he has ever been regardless of her feelings, and treated with indignity; and he has given her no justifiable cause either to abandon his domicil or institute this action. He prays, that the suit be dismissed; the plaintiff's demand rejected as unjust and unfounded, and in case of separation, that he be decreed to be the owner of the Marengo plantation and slaves, with their increase and all the other property thereon; that the community be settled and divided among them.

Upon these issues and pleadings the cause was tried. There was a mass of testimony taken on both sides, in support of the respective allegations and averments of the parties, which comes up in the record, and is too voluminous to be detailed. It is fully stated in the opinion of this court.

There was judgment for the plaintiff, decreeing a separation from bed and board; and of property, goods and effects of every kind; also for $4,306; that she be put in possesion of one-third of the Marengo plantation and slaves, with their increase, as she owned them previous to her marriage; and also that she recover one half of the acquests and gains made during marriage, and a partition made of all the property; the defendant to pay the costs of suit; the costs of partition to be borne equally by the parties. The defendant appealed.

A. N. Ogden & Dunbar, for plaintiff, argued at much length. They contended, that the grievances and outrages towards the wife and her daughter, as set out in the petition, were fully

WESTERN DIS. October, 1841.

ROWLEY vs. ROWLEY.

sustained by the evidence, and were good grounds for a separation from bed and board; and in this respect the judgment of the inferior court must be affirmed.

2. The answer refers to plaintiff's conduct towards her first husband. The evidence fully establishes the fact, that he treated her cruelly; was intemperate, and his conduct very bad. This fully accounts for her deportment as detailed by the witnesses. Violence towards the wife is not necessary to be proven. If excesses and brutal treatment of her is shown, which renders their living together insupportable, it is sufficient to authorize a separation; 9 Martin, 452; 2 Toullier, No. 764; 2 Duranton, Nos. 531, 552, 553.

3. It is shown, that the defendant after he became possessed of all his wife's means and fortune, and in the possession of large property, was exceedingly parsimonious towards her and her daughter; denying the means of a comfortable and decent support; often even the necessaries of life were denied her.

4. The plaintiff's counsel further contend, that the Supreme Court has no jurisdiction of a question of divorce itself, because it is not a money demand: but it has of the question of a separation of property and the restoration of the paraphernal estate. 3 Martin, 44.

5. The appellate court may entertain jurisdiction of part of a case, and not of the remainder. 4 Wash. C. C. Rep., 492. As to the paraphernal property, the plaintiff is entitled to recover one-third of the Marengo estate in kind, because the husband could not purchase the interest of his wife therein. The husband cannot purchase from the wife. La. Code, art. 2421; 13 La. Rep., 173; 14 Idem, 115; 12 Toullier, Nos. 155-6.

Stacy & Gen. Huston, for the defendant and appellant, insisted, that the allegations in the petition were vague and insufficient to establish the plaintiff's case. Those relative to cruel, oppressive and other bad treatment are vague and general, and refer to no particular acts or conduct of the hus-

hand. The only real and definite allegation is the one in relation to the want of necessaries and the comforts of life, and that they were not furnished or allowed. If this were the fact, she had her remedy without a resort to this action. The evidence does not sustain the allegations as to oppressive and cruel treatment, and furnishes no ground for separation.

2. It is shown, the plaintiff had an allowance of $600 a year for clothing of herself and daughter, besides market money, amounting to from $4 to $10 per week. Other advances and allowances were made; and plaintiff's own testimony shows, she was amply supplied with necessaries, &c.

3. The defendant by purchasing the Marengo estate, made it community property; he was also responsible to the wife for her share of the *price*. The sale was made to effect a partition among co-proprietors, of whom his wife was one, and he had a right to purchase. The Marengo estate then became community property, with all the increase and young of slaves. 18 La. Rep., 351; 12 Idem, 107; La. Code, 2341, 2420 and 1784.

4. The plaintiff has failed to make out her case for a separation according to law; the opinions of her witnesses are not to be taken, but facts. La. Code, 138. All she can claim is the possession and administration of her paraphernal property; and this without recovering any interest on the amount.

Garland, J. delivered the opinion of the court.

This action is instituted for a separation from bed and board, a recovery of the paraphernal property of the wife, a dissolution and settlement of the community of acquests and gains and partition of the same.

The petition states the parties were married in the State of New York in the month of April, 1834, the plaintiff being a resident of the State of Louisiana, and the defendant then a resident of the former State. That in the autumn of that year

WESTERN DIS. October, 1841.

ROWLEY vs. ROWLEY.

the plaintiff returned with her husband, and they settled in the parish of Concordia, which was the domicil of the wife previous to and at the time of her marriage, where she owned a considerable property in land and slaves. The petition goes into a long detail in relation to the property she owned at the time of the marriage, the fact of being previously married and having a daughter, all of which circumstances and allegations will be hereafter noticed in connection with the decision upon the law and evidence of the case. She further alleges that with a view to the promotion of the happiness of herself and daughter, she married the defendant relying on his professions of attachment, but all her hopes and expectations have been blasted and the marriage has proved destructive to her peace and happiness and injurious to the interests and future prospects of her daughter. That ever since the marriage her husband has pursued towards her a course of injustice and oppression evincing a total disregard of her rights, wishes and feelings, and has been guilty of repeated acts of cruel treatment and outrage to her feelings, of such a nature as to render their longer living together insupportable.

The petitioner further represents that in consequence of the conduct of defendant she has been compelled to leave the common dwelling and commence a suit for separation. It is further represented that as she reposed entire confidence in her husband she had permitted him to administer all the property, whether paraphernal or otherwise, which was very large, and he had neglected and refused to provide her with the necessaries and comforts of life and neglected and refused to aid her, or provide for the education and comfort of her daughter, or even permit her from her own ample means to provide for her own comfort and that of her child, whilst he was using money raised from the profits of the estate to enrich himself.

The petition then enumerates many circumstances connected with this general allegation, and proceeds to set forth her claims to her paraphernal estate and interest in the community of acqnests and gains. She claims one-third of the estate called

"Marengo," with a large number of slaves on it, together with the stock of horses, cattle and other animals, and all the plantation utensils. She also claims various other property and sums of money making altogether nearly $20,000.

The petition concludes by stating her feelings have become entirely alienated from her husband, that she has lost all respect for him, and repeating that their living together is entirely insupportable. She therefore prays to be authorized to institute this suit, that a domicil be assigned, an adequate alimony be allowed her, that an inventory and appraisement be made of all the movable and immovable property, that an injunction issue to restrain him from disposing of any part of the property; that there be a separation from bed and board decreed; and further that she be restored to the possession and administration of her separate estate and recover one-half of the community of acquests and gains, of which she asks a partition be made.

The various initiatory orders were made by the judge as prayed for, an injunction issued to restrain defendant from selling the property during the pendency of the suit, and the house of Mr. Debruys, in the parish of St. James, was assigned as the residence of plaintiff, an allowance of $200 per month was made for her support during the pendency of the suit, and an inventory and appraisement of all the property made in compliance with the prayer of the petition.

The defendant for answer pleads a general denial. He admits the marriage, but denies the plaintiff was a resident of Louisiana at the time or for a long time after, or that it was the intention of either to make their domicil in said State, and they did not remove into Concordia until the autumn of 1835. He says there is no justifiable cause for a separation from bed and board. He denies he has ever ill-treated the plaintiff or her daughter in any manner. He bears willing testimony to the many estimable qualities of the daughter, and also admits the plaintiff possesses many amiable qualities, but says from a constitutional defect of temperament, she will for very slight

causes or no causes at all, fly into the most extraordinary and uncontrollable paroxisms of passion, which he says has embittered his peace of mind, and to the same causes he attributes the separation of plaintiff from her first husband. He says when she is excited she is abusive and commits acts that are unjustifiable and incompatible with the duties of a wife. That he has used all the gentle means in his power to induce the plaintiff to control her violent temper, but without success. That he has at all times endeavored to supply plaintiff and her daughter with all the necessaries and comforts of life, suitable to his situation and pecuniary means, and says the complaints of plaintiff are entirely unfounded.

The defendant admits the purchase of the Marengo estate on the 15th of June, 1835, for $137,500, which plantation with the slaves and stock then belonged to his wife, her brother and sister in equal portions, which was sold by order of the Court of Probates to effect a partition between the co-proprietors. By which purchase he says he acquired title to said property, and became liable to pay the former owners the price stipulated, and he is the owner of all the property and its increase. He says the community is burdened with many heavy debts, one-half of which plaintiff is liable to pay. He denies he has squandered or improperly disposed of any of the community property, or that he has speculated or used the means in his hands for his exclusive use, but has in all matters acted for the common benefit. He concludes by asking a rejection of the plaintiff's demand, but in the event of a judgment of separation, he prays to hold as his separate property the plantation called Marengo, with the slaves and their increase, and all the stock and agricultural implements, and that the community be finally settled and ascertained.

The separation from bed and board is claimed under the art. 138 of the La. Code, and the first section of the act relative to divorces, approved in 1827, p. 130, which says that married persons may reciprocally claim a divorce on account of excesses, cruel treatment or outrages of one of them towards the other,

if such excesses or ill-treatment be of such a nature as to render their living together insupportable.

A great deal of evidence was taken on the trial, which has swelled the record to a large volume. There was judgment for the plaintiff decreeing a separation, restoring her to the administration of her paraphernal property, and ordering a partition of the community property, from which the defendant has appealed.

The first question to which our attention has been called is the jurisdiction of this court. The plaintiff denies its jurisdiction so far as concerns the question of separation from bed and board, as it does not present a question appreciable in money, and as the jurisdiction of this court is limited to civil cases in which the matter in dispute shall exceed the sum of three hundred dollars, it is denied that it can take jurisdiction of the case or revise the judgment of the District Court. The jurisdiction has been expressly given by the second section of the act of 1827, and we are called on to declare this law unconstitutional. If we had doubts upon the question, we should not act upon them, in a case where the will of the legislature has been so clearly expressed, but upon this question we have not the slightest doubt of our jurisdiction.

This court will take jurisdiction of a suit for separation from bed and board, although the matter in contestation is not *appreciable in money*, or does not consist in a money demand exceeding 300 dollars.

The law expressly gives the courts jurisdiction in cases of separation from bed and board, and in actions of divorce; and this court will not hesitate to act under it, when they have not the slightest doubt of the constitutionality of the law.

The counsel for the plaintiff relies much upon the decision of this court in the case of Laverty vs. Duplessis, 3 Martin's Rep., 42, in which it was held no appeal would lie from "proceedings upon a *habeas corpus*, and that this court had no criminal jurisdiction, nor would it exercise a general superintending authority over inferior tribunals." We do not well see how the disclaimers of authority in that case, which is not similar, can be brought to bear upon this, where the power is expressly given. Whilst this court will not assume powers not given by the constitution and the law, it will not rigidly restrict its jurisdiction, and deprive a citizen by rigid rules and technical standards, of the right of coming before it, to claim his rights or redress his wrongs. We cannot believe it was the purpose of the framers of the constitution to confine our juris-

WESTERN DIS. October, 1841.

ROWLEY vs. ROWLEY.

diction in a question like this, to an examination of the results of a separation from bed and board, and yet deprive us of the power of examining the cause. According to the doctrine of the plaintiff's counsel, we can revise the judgment of the court settling the principles upon which the community of acquests and gains is to be settled, but we cannot say whether the causes which dissolve that community are legal and sufficient. A man who claims a slave or animal, the value of which exceeds $300, can be heard in this court, but if a child is purloined from its parent no relief can be had from this court, according to this doctrine, because the affections and feelings of a parent cannot be valued in coin. If an action were brought to recover a child, it might perhaps be necessary to allege a loss of services, yet if it were an infant, we all know no value could de attached to its services; in this case the defendant says he does not wish to lose the services of an economical wife, and had it been required he could have made an affidavit they were worth more than $300, and thus given jurisdiction.

After having for more than a quarter of a century entertained jurisdiction of cases of this description without question, we are not disposed to abandon it upon the grounds assumed.

Upon affidavit made, and in consideration of its being the first term, a continuance should be allowed; but if on appeal it appears that by the admissions of the adverse party, &c., no injury is sustained by going to trial, the case will not be remanded on this account.

The next question is, in relation to the continuance asked for in the court below. Upon the affidavit made, and in consideration of its being the first term of the court, we think the cause should have been continued, and if it were not, that we are of opinion the judgment cannot under all the circumstances, be maintained in those parts to which the testimony sought was applicable, we should remand the cause for a new trial, but that is not necessary, as we view it at present. We have looked at the whole record in reference to this question, and find that by the admissions of the plaintiff as to what some of the absent witnesses would testify, and by the exertions of defendant in procuring the depositions or attendance of others, the case has been fully examined, and no injury has been sustained by the refusal to continue it.

Upon the main question of a separation from bed and board, we are of opinion the plaintiff has failed to sustain her action. In this court the case has not been argued upon the ground of any personal violence being offered to plaintiff, or that any abusive language has been used of or to her. The evidence completely negatives any such assertion, and we have given it a most attentive consideration. The remarks which the defendant may occasionally have made as to some of the accounts the plaintiff had created, or in relation to trifling articles used by her daughter, are not worthy of the importance that has been attached to them, and we find no evidence to sustain the allegation he ever attacked the character of the plaintiff's deceased father.

The impressions which the mass of testimony taken in the cause have made on our minds are, that the plaintiff is a woman of a nervous and very irritable temperament; easily excited and incapable or unwilling from long indulgence to exercise any control over her passions when aroused. This seems to be the opinion of those who have known her long and intimately, and when she left the matrimonial domicil or shortly before, she appears to have been highly excited from various causes, and a physician who testified on the trial, says he thought "it was a mental derangement." That the warmth of her temperament is constitutional or of long standing is evident from the statement of one of the witnesses, who says she saw her throw a silver slop bowl at the head of her first husband, who however acknowledged on his death-bed he had done her much injustice. The defendant is represented as a man of respectable character and intelligence, on all occasions he appears to have treated the plaintiff with respect and kindness, when she was excited, he either endeavored to pacify her, was silent, or left the house, and more than one witness deposes, that plaintiff has said, that no matter how abusive she was to him, he never would say any thing unkind to her. When the final separation took place, though both parties were then highly excited, it appears from the testi

mony of plaintiff's sister, that the defendant used no ungentlemanly expression in the conversation that took place. The presiding judge of this court in the case of Fleytas vs. Pineguy; 9 La. Rep. 419; said, "husbands are men, not angels;" and the evidence in this case induces us to doubt, if all of the other sex are entitled to claim the attributes of angels.

The principal reliance of the plaintiff in this court has been, that the defendant has not supplied her and her daughter with the necessaries and comforts of life, in a style suitable to the fortune she brought into marriage, and that which the parties now possess. As to what are comforts and necessaries, there may be various opinions, and it is not easy to define them. But we can from the evidence, safely express our belief that a large majority of the wives in the conntry are not as well supplied with the comforts and necessaries of life as the plaintiff seems to have been. Several witnesses say, she and her daughter had not a sufficiency of clothing, the house in which they lived was not as good or as well furnished as it should be, the carriage was old, and she had not a sufficient supply of money to spend, although she was a very economical lady. When we come to examine the particulars, we find that the plaintiff and daughter were not altogether deprived of what was necessary and comfortable, but they were not supplied in that style which suited the taste of some of plaintiff's friends. It appears from the complaints of plaintiff to a few of her intimate associates, the defendant did not give her as much money as she thought she had use for, and neglected or delayed payment of some of her bills, and of his own debts. It is not shown how much money he gave her, or that he unreasonably refused it when he had it, but it is shown she had a general credit in Natchez, which from the accounts in the record seems to have been freely used, she and her daughter always appeared well dressed; and it is shown that defendant finally made an allowance of $600 per annum to plaintiff and her daughter, to supply their wardrobes alone, which the former insisted should be increased to one thousand dollars.

That some one or two of the bills of plaintiff were not promptly paid appears to be true, and that some of defendant's own debts were not paid is equally true, but that is not a legal cause for a separation from bed and board; if it were, we fear the dockets of our courts would show a much larger number of suits like this, than they happily do.

From the testimony, it appears the defendant is an enterprising and industrious man, prospering by a system of prudence and rigid economy, more commendable in his situation, than a course of extravagance. He appears to have contracted some very large debts, and remembers it is a duty to be just, before he is generous even to his own household.

Towards the plaintiff's daughter, the defendant appears to have conducted himself with kindness and general attention. We see nothing to censure in the manner he has treated her. That the expenses of her education are not all paid, is not a reason that can sustain this suit.

The doctrine laid down in the case of Tourné vs. Tourné; 9 La. Rep. 452; in relation to excesses, cruel treatment and outrages, has been pressed on us in this, but we are unable to apply it, as the facts will not sustain us in so doing. It is said, it is impossible for the parties to live together again after what has occurred, and we had as well affirm the judgment of separation. The same arguments were advanced in the case cited, and in that of Fleytas vs. Pineguy, without effect. We cannot admit their force now, and do not despair of seeing reason and a proper sense of what is due to propriety, resume their supremacy, and yet hope the plaintiff will return to the matrimonial domicil, and again resume the position she has occupied in society, the affections of her husband, and the estimation of her friends.

Our judgment upon this part of the case makes it unnecessary to say any thing in relation to the property in community between the parties, of which the defendant will retain the control as provided by law, further than as it may be connected with other questions.

Living unhappily together; having frequent differences, ebullitions and displays of temper, but without any personal or other violence; the want of supplies or necessaries according to the wife's demands; the non-payment of her bills promptly, and education of her daughter; the want of support according to her rank and fortune she brought to the marriage, and supposed impossibility of the parties ever living together again, are not sufficient *cause of separation from bed and board.*

WESTERN DIS. *October, 1841.*

ROWLEY vs. ROWLEY.

It is alleged and proved beyond question, that the plaintiff brought into marriage a large paraphernal estate, of which the defendant has had the administration; she now claims the restitution of it. To this she is clearly entitled. La. C. arts. 2360, 2361, 2364, 2368; 8 Martin N, S. 229; 10 La. Rep. 136; 3 Martin N. S. 612. But to ascertain of what that paraphernal estate is composed, is a question of more difficulty.

The plaintiff claims one third of the plantation called Marengo, situated in the parish of Concordia, with all the slaves on it on the 15th of June, 1835; the stock of horses, cattle and all other animals with the plantation, utensils, &c.; also one third of the slaves born since that date, and a considerable sum of money received, which belonged to her.

We will first consider plaintiff's rights to the one third of the Marengo property. The defendant contends the whole belongs to the community, and if plaintiff is entitled to any thing, it is only the price at which he purchased it. To understand this question and some others that arise in this case, it is necessary to state how this property was acquired.

This estate was the property of plaintiff's father, James Kemp, who died, leaving six heirs to inherit it. In 1831, this property was sold at a Probate sale and purchased by three of the heirs, to wit: Jane Girault, now the plaintiff, her sister Mrs. Frances E. Sprague, and their brother, James Kemp, for the sum of $70,100; payable at different terms, and the price secured by a mortgage on the property. The portion of each heir was $11,683 33. The portion of the two minors bore interest at 8 per cent. from the 31st of December, 1831. For which notes were given by the purchasers.

Sometime after this, D. B. Kemp, one of the minor heirs died, and his five brothers and sisters inherited his portion, which, on the 15th of June, 1835, amounted with the interest to $14,915 71, and the portion of each heir to $2,983 14. On the last mentioned day, the whole property was again sold by the Probate Judge, under a judgment of that court, for the purpose of effecting a partition among the co-proprietors, one

of whom, James Kemp, had also died, leaving two minor children. The terms of this sale were two thirds in cash, and the other third coming to the minors in five equal annual instalments with 10 per cent. per annum interest until paid. Upon these terms the defendant purchased the Marengo estate with seventy-six slaves, and all the stock and plantation, utensils, for $112,500; he also agreed, to pay the above mortgage of $14,915 71, in favor of D. B. Kemp's heirs, also two mortgages of $4,000 each, given by plaintiff and her sister, Mrs. Sprague, and some other sums, making the sum of $137,500.

This sale, the defendant contends, divests the plaintiff of all her title to the one third of the property she owned, and vests it in the community, it being liable to her for the price only. The plaintiff contends that by this sale she is not divested, as her husband could not purchase her property, all sales between husband and wife, unless in special cases, being prohibited.

Before proceeding to notice this question, we will dispose of one, which although not very material, at this time is one much relied on by defendant, as affecting this question. It is, that as there was no community existing between plaintiff ahd defendant previous to this sale, they not being residents of this State until then, the whole estate not only became community property, but that defendant is only bound to account to plaintiff for one half of the price, and not for that until the community is dissolved. To this we cannot give our assent. It appears to us it is shown, the plaintiff always had her legal domicil in this State, and the fact of her marrying in another State, where she was temporarily residing, does not deprive her of her legal rights and control over her property. Admitting all that was said about going to Illinois to be true, the parties never went there, and mere words cannot control acts and conduct so palpable in their consequences as are exhibited in this case. It is stated by one witness, that when plaintiff expressed a wish to reside in Illinois, the defendant said he

Where a woman has her domicil here, and marries in another State, it does not prevent a community of acquests and gains from existing, when the parties afterwards remove to Louisiana.

WESTERN DIS. October, 1841.

ROWLEY vs. ROWLEY.

would not consent to it, as the laws of Louisiana afforded protection to the property of married women. This question must therefore be considered in reference to our laws.

That the title to the whole estate called Marengo, with the slaves and Stock thereon, on the 15th of June, 1835, was by the sale and purchase then made, vested in the defendant, and therefore community property, we have no doubt. The proceedings which were had previous to this sale, were for the purpose of effecting a partition of the joint estate; they were provoked by Mrs. Sprague and her husband, the plaintiff and defendant both being defendants, and a special allegation without denial, that they are residents of Concordia. The sale was a forced and judicial one, for the purposes of partition, and at such a sale we think a husband may be a purchaser, and by it vest all the interest of the wife in the community, it being responsible to her for the price only. This view of the case is, we think sustained by the La. Code arts. 1263, 1265, 1304, 2341, and 1 Martin N. S. 463; 12 La. Rep. 172; 17 Idem 296.

In a judicial sale for a partition among several heirs, the husband of one of them may purchase the entire property sold, which becomes community property from that time; he being responsible to the wife for the price only.

The articles of the Code which prohibit sales of property between husband and wife, relate to those which are not judicial in their character, and in some of them, the husband could not purchase, until a recent act of the legislature, in consequence of the peculiar relation in which he or his wife stood towards the estate. But we see nothing in the law to prevent a husband from purchasing at a probate sale of the succession, to which his wife is an heir, a portion or the whole of the property, composing it, and holding as if such property were purchased from any one else. If he afterwards receives her share in the succession, he is responsible for it to her, as her paraphernal estate. If the executor or administrator should call on the husband to pay the price of property so purchased, we do not see how he could oppose as compensation the interest which the wife has in the succession, without her consent. But should the portion of the wife be imputed to the extinguishment of the price to be paid by the husband,

Where, in a purchase by the husband, the portion of the wife in the estate sold is imputed to the extinguishment of the price to be paid by him, he is bound to her for it, with a legal mortgage to secure it, if he administers her paraphernal estate.

then he is unquestionably bound to her for it, and she is entitled to a general mortgage to secure her interests, if her husband administers the paraphernal estate.

The dower of the wife may be sold for particular purposes, such as paying debts she owed at a certain period, previous to the marriage contract, and we know of no good reason, why the husband cannot purchase at such a sale; yet the law imposes more restrictions on the sale of dotal than paraphernal property.

It has been urged on us with much zeal, the interests of the husband and wife should never be opposed to each other, and the former be placed in a situation, where it would be his interest to purchase the property of the latter, for less than its value. There is force in the argument, and it should not be done, whenever it can be avoided; but as long as husband and wife are considered as partners merely, cases must sometimes arise, wherein their interests will be in real or seeming opposition, and it is then generally best, to act upon the principle, that the husband will be more disposed to protect the interests of his wife, than that he will be to defraud her. In sales made for a partition, the interests of the co-proprietors will in general be a strong guarantee and protection to the interests of the wife, where the husband purchases the whole estate, and in cases where there are no co-proprietors, or where there is, it is better the husband should stand in a position, where he can protect the interests of his wife, although he may possibly abuse the trust, than that he should be bound to stand by powerless, and see her interests subjected to the combinations or cupidity of strangers.

These views of the case are most favorable to the interests of the wife, because she not only gets the price the property may sell for at auction, but the property then goes to enrich the communiiy in which she is a partner. As to the community generally, we think this the most beneficial interpretation we can give the law, as it relieves the property of the citizen from some of the burdens that encumber its alienation.

WESTERN DIS. *October*, 1841.

ROWLEY *vs.* ROWLEY.

The defendant must therefore account to the plaintiff for one-third of the price, for which the plantation and slaves sold. But what that sum is, seems to be a contested question. The plantation was bid off for $112,500, "*subject to the payment of the mortgages specified.*"

One of the mortgages specified was in favor of D. B. Kemp's heirs for $11,683 33, with 8 per cent. interest, from the 31st of December, 1831. The defendant contends, that as the plaintiff was a debtor for one-third of that sum, and afterwards became an heir for one-fifth, as to her there was an extinguishment of the mortgage by confusion, and he is not bound to pay her the fifth of D. B. Kemp's mortgage. If this were to be permitted, the defendant would benefit by the inheritance from David. B. Kemp, and not the plaintiff, who was the real heir. Whether correctly or not, this mortgage was supposed by all parties to exist at the time of the sale in 1835, and it formed a part of the price defendant was to give for the property. If it had not existed, he would have been obliged to have paid that much more for the land, for we do not understaud that the mortgages were to be paid out of the $112,500, but over and above that sum.

The mortgage in favor of D. B. Kemp's heirs, principal and interest, amounted at the time of the sale to $14,915 71, of which the portion of the plaintiff was $2,983 14, for which the defendant must account to her.

The plaintiff further claims the sum of $3,176 36, which she says the defendant received from her sister, Mrs. Sprague, for her. Mrs. S. was also one of the heirs of David B. Kemp, and this sum was the amount of her portion with interest at the time it was paid. She acknowledged the receipt of it in an authentic act, and releases the mortgage on the Marengo property. The plaintiff says, that although in the act Mrs. Sprague says she received this sum in cash, it was in fact settled by imputing it to a debt, which Mrs. Sprague's deceased husband was owing plaintiff, and her property was therefore used by defendant to pay a community debt. The defendant

was interrogated on oath as to this transaction. To a portion of the interrogatories he objected and refused to answer, and to the portion he did answer, he responded so vaguely, that we are constrained to believe his purpose was to evade an answer; the interrogatories must therefore be taken as confessed. If the defendant had have paid Mrs. Sprague in cash, as the act says he did, nothing could have been easier, than for him to say so, and we cannot see, how it would have committed him to any third person. He must therefore account for the sum claimed, as we think it is sufficiently shown, he used a debt owing to plaintiff, to pay a debt of the community. This opinion is based entirely on the answers which the defendant gave to portions of the interrogatories and the effect of his refusal to answer the remaining portions of them. It therefore becomes unnecessary to express any opinion upon the bill of exception taken to the testimony of Mrs. Sprague on this part of the case.

The plaintiff further claims the sum of $2000, the amount of a draft drawn by both plaintiff and defendant, on Sturges Sprague, of Natchez, who was plaintiff's agent in the management of her affairs, previous to and sometime subsequent to her marriage with defendant. This draft was drawn sometime after the marriage of the parties, in 1834, in the State of New York. It is shown, neither of the parties had money at the time to enable them to return to Louisiana, and this mode was adopted to raise the means. It is admitted, the defendant at the time had no funds in the hands of Sprague, to whom he was a stranger. The draft was paid by Sprague, and was in plaintiff's possession at the time of the trial, which creates a presumption, she had paid it. It was at any rate enough to throw the burden of proof on defendant, to show he had paid it, or had funds in Sprague's hands; 13 La. Rep., 13, 367. This he has not done, although he has had an opportunity of discharging himself by answers to interrogatories propounded to him. For this sum he must also account.

The next claim is for the proceeds of the sale of a slave

which belonged to plaintiff previous to her marriage, who seems to have been a house servant or personal attendant. When the plaintiff left for New York in 1833, she left this slave with her sister in Natchez, where the slave remained until her return after her marriage. Sometime after their return, defendant sold this slave for $800. It is proved, the slave was on the Marengo plantation with plaintiff previous to her marriage, and there is no doubt, she once belonged to her. The defendant says, that as the slave was in Mississippi, where property of that description is considered personal, and as there was then no community of property existing between him and his wife, the title of this slave was vested in him by the marriage. We have heretofore expressed an opinion as to the time the community commenced, and we do not think, that because the parties and the slave were temporarily in Mississippi, that the right of property sanctioned by the laws of this State, was changed. The admission of such a doctrine would change the character of the title to slave property in every State, through which a person might pass, attended by one of his domestics. The defendant must therefore account for this sum.

The next sum claimed is $375, which was received on a check given to plaintiff in her own name, by Sturges Sprague, her former agent. It is dated January 12, 1835, a short time after the parties arrived at Natchez or Concordia. The defendant in his answer to interrogatories, says, he thinks he received the money, but he adds, he "believes it was received for plaintiff, and expended by her, or specially for her individual benefit." As the admission of the receipt of the money is not definite, and there is a probability of it being used by plaintiff, we do not think she ought to recover it.

The last demand is for the sum of $90, received by defendant for some cattle, that were sold, which belonged to plaintiff. This sum appears to be proved.

From these sums the defendant is entitled to have deducted the sum of two hundred dollars, advanced to the plaintiff previous to their marriage, and he is also entitled to a further deduction, for the share of the wife in the marriage charges, from the date of the marriage in April, 1834, to June 15, 1835, a period of fourteen months, during all which time the daughter of plaintiff was being educated at Troy, in New York. The article 2366 of the Code says, if all the property of the wife be paraphernal, and she have reserved to herself the administration of it, she ought to bear a proportion of the marriage charges, equal, if need be, to one half her income, and in case of separation of property, she must contribute in proportion to her fortune, and to that of her husband, both to the household expenses and to those of the education of the children, but if nothing remains to the husband, she is bound to pay all those expenses alone; La. Code, art. 2409. It is very satisfactorily shown, that from the time of the marriage to the purchase of the Marengo estate, the defendant had very little or no property, whilst the plaintiff had a large property, which was administered by her; she is therefore bound to contribute at least one half to the matrimonial charges, which we think a full compensation for the amount of the draft drawn by them on S. Sprague, and the price of the slave Dinah, sold as before stated.

If the wife have a fortune, and is in the administration of it, and the husband little or none, she is bound to pay or contribute at least half of the matrimonial charges.

The defendant, as we infer from the statements presented and the arguments of his counsel, also claims a credit for $4000 and interest paid by him, it being a separate debt of the plaintiff, secured by a mortgage on the Marengo plantation and slaves. This we think he is not entitled to, as by the terms of the sale he was to pay the mortgages mentioned in it as a part of the price.

The amount of the plaintiff's paraphernal claims which are allowed, consist of:

WESTERN DIS. *October*, 1841.

ROWLEY *vs.* ROWLEY.

One-third of the sum of $112,500, the sum for which the plantation called Marengo, with all the slaves and stock sold on the 15th of June, 1835,		$37,500 00
The sum received from Mrs. F. E. Sprague,.....		3,176 00
The portion inherited from D. B. Kemp,.....		2,983 14
The draft on Sturges Sprague drawn by plaintiff and defendant,.....		2,000 00
The price of the slave Dinah sold,.....		800 00
Amount received for cattle sold,.....		90 00
		$46,549 14
DEDUCT.		
Plaintiff's proportion of the matrimonial charges from the time of the marriage to June 15th, 1835,.....	$2,800 00	
Advances by defendant to plaintiff previous to the marriage,.....	200 00	
		3,000 00
Amount of plaintiff's paraphernal estate,.....		$43,549 14

For the sum of $2983 14, we think the plaintiff has a special mortgage on the plantation called Marengo, and all the slaves and stock sold on the 15th of June, 1835, having inherited it from David B. Kemp; for the remainder of her claim amounting to the sum of forty thousand five hundred and sixty-six dollars, she has a legal mortgage on all the property of her husband, the defendant; for the sum of $37,390, part thereof, to take effect from the 15th of June, in the year 1835, and for the sum of $3761, the other part thereof, a like legal mortgage to take effect from the 15th day of October, 1839, it being the date said sum was received from Mrs. F. E. Sprague.

The wife is not entitled to interest on recovering her paraphernal property, when the husband administers it, or when it is administered indifferently by the husband and wife; as the fruits of paraphernal property, except the young of slaves belong to the community.

We do not think the plaintiff is entitled to recover any interest on the amount allowed her, previous to the rendition of the judgment in the District Court. By article 2363 of the Code all the fruits of the paraphernal property, with the exception perhaps of the young of slaves, belong to the community, when the husband administers the property, or when it is

administered indifferently by the husband and wife. In this case, there exists a community, and the paraphernal estate appears always to have been administered by the defendant, or by him and the plaintiff indifferently; the disposition of the profits is therefore regulated by the article of the Code above cited.

When this action was commenced, the District Judge assigned the plaintiff a domicil at the house of Mr. Debruys in the parish of St. James, and allowed an alimony of $200 per month, for the support of herself and her daughter. This allowance the defendant never paid her, and during the pendency of the case in the District Court, a rule was taken on him to show cause why an execution should not issue, to enforce the payment of it. She also took a second rule on him, to show cause why the domicil should not be changed from the parish of St. James, to the house of a person residing in the parish of Concordia. To the first rule the defendant showed for cause, that the allowance was excessive, that plaintiff had the use of one or more servants, which she was not entitled to, and that she had left the domicil assigned her without the assent of the judge or the defendant. To the second rule he answered, the court had no right to change the domicil first assigned plaintiff, without his (defendant's) assent, and that he peremptorily refused to give.

As to the first question, we do not think the allowance under the circumstances of the case is excessive. The plaintiff had a large property previous to her marriage; the defendant has had the benefit of it, and retains possession of upwards of $43,000, without interest, up to the time of the judgment. By an agreement between the parties, which is of no validity, he had engaged to pay her the highest rate of conventional interest on about $41,000, which he has never paid, he therefore complains with a bad grace of the sum allowed for alimony.

As to the second question, we think the plaintiff has not lost her right to alimony by leaving the domicil assigned her. It is in evidence, she left it once and went to New Orleans to con-

WESTERN DIS. *October*, 1841.

ROWLEY *vs.* ROWLEY.

sult with her counsel in relation to her business, in consequence of having some papers served on her by the sheriff of the parish of St. James, which she supposed it was necessary to communicate to her counsel. She left on Friday and returned the Sunday following. The other instance in which she left the domicil, was about a week or ten days previous to the commencement of the court, at which she expected this suit would be tried, and it is in evidence, it was necessary she should be in a convenient situation to consult with her counsel and communicate information to them. We think the reasons very sufficient, to authorize the plaintiff to leave the domicil assigned her. We do not understand the law to mean, the wife must never quit the house assigned as her residence. It never intended she should be imprisoned and not go out without the leave of the husband or the judge. If she leaves the assigned residence for necessary purposes, and only for a reasonable period, she loses none of her rights by so doing. We think a correct view of this question was taken in the case of Le Beau vs. Trudeau, 1 Martin, N. S., 93.

During the pendency of a suit of the wife for a separation from bed and board, the wife may leave the home assigned as her residence on business, and be temporarily absent.

The district judge deducted from the amount of the alimony due on the 20th of June, 1841, the services of a slave which the plaintiff had in her service, and ordered an execution to issue for the remainder. In so doing we think he decided correctly, and the judgment on the rule must be affirmed with costs.

But it is contended if no judgment of separation is given, there can be no judgment for alimony. We think differently, and the case in the 1 Martin, N. S., 93, is directly in point.

A judgment for alimony may be given, even when no separation from bed and board follows.

As to the second rule to show cause, we do not think the court erred in changing the residence of the plaintiff. The mere will of the defendant is not a sufficient reason to prevent the court from acting; and we think it a sufficient reason that she wished to be in the parish where she had long resided, where her friends are, and the property in which she is interested is situated.

The court may in its discretion, change the residence of the wife during the pendency of her suit for separation.

The judgment of the District Court is therefore annulled,

avoided and reversed, and this court proceeding to give such judgment as in their opinion ought to have been given in the court below, do order, adjudge and decree, that so much of the plaintiff's demand as relates to a separation from bed and board, and a dissolution, settlement and partition of the community of acquests and gains existing between the said plaintiff and defendant, be finally rejected and dismissed. And it is further ordered, adjudged and decreed, that the plaintiff, Jane Rowley, be restored to the administration of her paraphernal estate, separate from and without the assistance or interference of her aforesaid husband, Charles N. Rowley, and that she recover of and have judgment against him, said Rowley, for the sum of forty-three thousand five hundred and forty-nine dollars and fourteen cents, with interest thereon at the rate of five per centum per annum from the third day of July in the year 1841, until paid, which is the amount of her paraphernal property received by her aforesaid husband, to secure the payment of said sum, with the interest thereon; she has a special mortgage on all that plantation called Marengo, situated in the parish of Concordia, together with all the stock of horses and cattle of every description, with the agricultural implements thereon and seventy-six slaves named and described in the sale thereof on the 15th day of June in the year 1835, for the sum of two thousand nine hundred and eighty-three dollars and fourteen cents, ($2983 14,) part of the aforesaid sum, to take effect from the date last aforesaid; and for the sum of thirty-seven thousand three hundred and ninety dollars, ($37,390) another part of the aforesaid sum, she is decreed to have a legal mortgage on all the property of the said Charles N. Rowley for reimbursing the same, to take effect from the last aforesaid date; and a like legal mortgage as the last mentioned, for the sum of three thousand seven hundred and sixty-one dollars to take effect from the 15th day of the month of October, in the year 1839: the costs in the District Court to be paid by the defendant and appellant, those of the appeal by the plaintiff and appellee.

WESTERN DIS. *October*, 1841.

WATERS *vs.* PETROVIC & BLANCHARD.

WATERS *vs.* PETROVIC & BLANCHARD.

APPEAL FROM THE COURT OF THE TENTH DISTRICT, FOR THE PARISH OF NATCHITOCHES, THE JUDGE THEREOF PRESIDING.

The last article (3521,) of the La. Code, which repeals all laws in every *case*, provided for in the Code, itself, applies not in every particular instance or cause, but to every *category* or *class of cases*, or *subject matter* upon which the Code contains express provisions, and abrogates all previous laws on these subjects.

The competency of witnesses is a distinct subject of legislative enactment. It is expressly and precisely treated of by the Code, (article 2260;) and it lays down all the great and leading principles of the law of evidence.

The article 2260 declaring who shall be a competent witness to prove any *covenant or fact*, whatever, in civil matters, makes no exception of any particular covenant or fact whenever parol evidence is admissible under the general provisions of the Code; and the act of 27th March, 1823, so far as it renders the maker of a note, &c., an *incompetent witness* in an action against the endorser, IS REPEALED by the last and repealing article of the Louisiana Code.

The repealing act of 1828, left in force the Louisiana Code, and also the law respecting the competency of witnesses; leaving the question still open, whether that competency as relates to makers of notes and drawers of bills, &c., was to be determined by the Code or act of 1823.

The general rules of evidence established by the Louisiana Code must be considered as applicable to all contracts whatever.

This court has held (in 5 La. Rep. 493,) that a part of the act of 1808, relative to proceedings upon prison bonds was still in force, notwithstanding the repealing act of 1828, and the Code of Practice.

A notary public, who is the son of one of the endorsers on a note, is not thereby rendered incompetent to make protest and give notice to all the parties.

A sheriff, who is the son of the plaintiff, in execution, is nevertheless competent to execute it.

So the grand-father of a legatee is a competent witness to a Will. The official act may be valid, and yet the public officer, be incompetent as a witness in any controversy growing out of the act.

This is an action by one endorser against his two previous endorsers, on a note for $3000, dated the 6th April, 1838, payable to the order of P. Petrovic, 24 months after date, and which was discounted in bank; protested for non-payment, and taken up by the plaintiff under protest. He now sues

and prays judgment against his two previous endorsers, as being liable to him.

The defendants admitted their signatures, but averred they endorsed the note in blank before its date, for the accommodation of the maker, T. W. Reed, and that it was only to be filled up for the sum of $1000. They then set up a special defence against the plaintiff; charging him with having received the note from Reed; divesting it from the original purpose and use intended; and of having it discounted for his own benefit and for a much larger sum. They released Reed, the maker of the note, and offerred him as a witness to prove their defence. He was objected to as incompetent to testify under the act of 1823, rendering makers of notes incompetent witnesses in suits against the endorsers. The protest of the note and certificate of notice was objected to as inadmissible in evidence, because the Parish Judge who made the protest, was the son of the plaintiff.

There was a verdict and final judgment for the plaintiff, from which the defendants appealed.

Dunbar & Hyams, for the plaintiff, maintained:

1. That the objection to the legality of the protest of the note sued on, because the Parish Judge who made it, was the son of the plaintiff who seeks to avail himself of it, is unfounded. At the time the protest was made, the bank was the holder of the note; "a certified copy *of the protest* and certificate of notice is good evidence of all the matters therein stated." Acts of 1821 and 1827, relative to protests.

2. It is clear that when Judge Waters made the protest, the bank being the holder of the note, he was not prohibited from performing such duties; then the evidence of these acts as performed by him must, in the language of the law, "be good evidence of all the matters therein contained." The judge is not called on to testify in this case, and if he was, he is incompetent to testify against, in favor, or of any thing beyond it; or which strengthens his official acts as declared and set forth in the certificate of protest. 17 La. Rep. 388.

WESTERN DIS. *October*, 1841.

WATERS vs. PETROVIC & BLANCHARD.

3. The law of 1827, relative to notaries and notarial protests, is subsequent to the La. Code, and contains no provisions incapacitating notaries on account of relationship.

4. The bill of exceptions taken to the rejection of Reed as a witness, because he is the maker of the note, is not well taken, as he is expressly excluded by the act of 1823. This act must be still in force, unless *expressly* or *impliedly* repealed.

There exists no law expressly repealing it; nor has it been repealed by any new law containing previous contrary to or irreconcilable with this act. Its existence and operation has never until now been doubted. On the contrary it has been expressly recognized on several occasions as being in full force.

5. It is contended that this law is repealed by implication in virtue of the article 3521 of the Louisiana Code repealing all statutes of the State, which have been specially provided for in the Code. We say the case of the rejected witness is not provided for in the Code; and because it declares some incapacities in witnesses to testify, it does not follow that it repealed all others. The question now is, has it been specially provided in the Louisiana Code, that all persons with regard to all contracts are competent witnesses, if they do not come within the exceptions contained in article 2260 of the Code?

6. The contract with regard to which this question arises is one coming under the commercial law; the principles of which were to have been embodied in a commercial code, (art. 2798 of the La. Code); therefore the provisions of the Louisiana Code, do not embrace this subject of the law: or touch the question now under consideration. The act of 1823 must consequently be considered in full force.

7. Finally, it appears that this court as far back as June, 1827, in the case of Flower vs. Griffith, 6 Martin, N. S., 90, gave a judicial interpretation to the article 3521 of the Louisiana Code now in question, denying all power to the jurisconsults who drew up the Code to repeal any of the former laws; and it was in consequence of that decision that the legislature

at its next session passed the celebrated *repealing act of* 1828, in which the old code was repealed and all former civil laws; but the 25th section of this act expressly excepts the competency of witnesses; see Session acts of 1828, p. 160.; 5 La. Rep., 494.

Boyce & Dunn, for the defendant and appellant, contended:

1. The defendants and appellants rely on the reversal of the judgment on the ground that the judge *a quo* erred in admitting the act of protest and notary's certificate of the manner of giving notice of protest to the endorsers; said act having been performed by the son of plaintiff, who could not be examined as a witness or give testimony in the case; La. Code, art. 2260.

2. This court has frequently held that a protest is not an authentic act within the meaning of 2231 article of the La. Code; see 16 La. Rep., 563; and that it is not an official act; 15 Idem, 555; and that it is not indispensably necessary that a notary should make a demand of payment of a note and give notice, but that any other person may do it; the mode of proof only being different; 16 Idem, 282. Will the acts of the plaintiff's son then be received as evidence, when he would be wholly incompetent to testify in the case if present?

3. The court erred in not permitting Reed to testify after we had released him, as he then stood indifferent to all the parties and was without interest; this was enabling the plaintiff to commit a fraud on the defendants, which it was the duty of the court to prevent; see 18 Johnson's Rep., 167; Bayley on Bills, 594 to 598.

4. The law or act of 1823, to which the judge *a quo* referred is not considered applicable to this case; and if it is, we conceive it has been repealed by the great repealing act of 25th of March, 1828, and by the adoption of the Civil Code; 13 La. Rep., 198; acts of 1831, page 114. Reed was therefore a competent witness; 8 La. Rep., 120; 13 Idem, 488; 2 Starkie on Evidence, 180, 181 and notes; Bayley on Bills,

WESTERN DIS. *October*, 1841.

WATERS *vs.* PETROVIC & BLANCHARD.

edition of 1836, 525 to 529, 544, 549; La. Code, arts. 2260, 3521.

5. The cause should be remanded for a new trial, with instructions to the judge *a quo* not to reject Reed's testimony. We would then be able to prove all the matters set up in our answer, and thereby entitled to a judgment in our favor.

Bullard, J. delivered the opinion of the court.

This is an action against two of the endorsers of a promissory note by another and subsequent endorser, who alleges, that he took it up after protest.

The defendants admit their signatures, but aver, that about a year previous to the date of the note they endorsed it in blank for the accommodation of the drawers, to enable them to raise one thousand dollars for the use of the steam boat John Linton, of which one of them, T. W. Reed, was then captain. That the note was not dated, nor for any particular sum, but it was well understood, that it should be filled up for one thousand dollars, payable at twelve months. That Reed not having it discounted, and not having use for it, was asked by Waters, the plaintiff, to lend it to him; that he was hard pushed, and that if Reed would let him have it, he would try and get it discounted in Bank, and at its maturity he would pay it and return it to him. That Reed then told him under what circumstances these respondents endorsed the note, and that he could not use it in that way. But Waters assured him, that if he would let him have the use of the note, he would pay it at maturity, and return it to him. That Reed finally consented to lend him the note, and that Waters then got Reed to fill up the blank for three thousand dollars, but leaving the other spaces in blank; that Waters kept the note some time, and then had it filled up, making it payable to the order of P. Petrovic, one of the defendants, dated it, and made it payable twenty-four months after date, at the office of the Canal and Banking Company of New Orleans at Alexandria, got it endorsed by James Norment

and J. R. Mead, and had it discounted for his own accommodation. They aver, that the plaintiff never gave any value for the note, but that he obtained the same by fraud and false pretences, having a full knowledge of all the circumstances.

There was a verdict for the plaintiff, and judgment having been pronounced thereon, the defendants appealed.

During the progress of the trial, the defendants offered T. W. Reed, one of the drawers, as a witness, to prove the facts set forth in their answers, after having tendered a full release of all his liability, as drawer of the note. He was rejected as incompetent, and the defendants took their bill of exceptions.

The act of the legislature of the 27th of March. 1823, "to repeal the act which authorizes a special jury in certain cases, *and for other purposes*," provides among other things, that in no case shall the drawer or maker of a promissory note or bill of exchange be a competent witness in an action brought by the holder against any of the endorsers, to recover the capital of such note and legal interest. (See 1 Moreau's Digest, *verbo* Jury.) Under this statute we held recently, that the maker or drawer was absolutely incompetent, notwithstanding a release of all interest; 18 La. Rep., 470. But the question now presented for our consideration, to wit: whether that statute is not repealed by the general repealing clause of the Louisiana Code, was not raised in that case, nor did it occur to us. If we then overlooked it, we consider it now our duty to reconsider the question, and if we have erred, we are ready to retrace our steps.

The incompetency of the drawer of a bill and maker of a note, as a witness in any case against an endorser is unequivocally declared by the act of 1823. Has that incompetency been removed by the provisions of the Louisiana Code? That is the question.

That part of the Code, which treats of the proof of obligations and of that of payments, establishes general rules relating to the cases, in which testimonial proof may be admitted, and

under what restrictions, and in what cases it is inadmissible; or in other words, what contracts may or may not be proved by witnesses. It then declares, who shall be considered as a competent witness, when that kind of evidence is admissible. Article 2260 declares, that "the competent witness of any covenant or fact, whatever it may be, in civil cases, is he, who is above the age of 14 years complete, of a sound mind, free or enfranchised, and not one of those whom the law deems infamous. He must besides not be interested neither directly nor indirectly in the cause. The husband cannot be a witness either for or against his wife, nor the wife for or against her husband. Neither can ascendant with respect to their descendants, nor descendants with respect to their ascendants." Such is the general rule of competency, whenever testimonial proof is admissible, and such are the exceptions, to wit: ascendants and descendants, husband and wife, with respect to each other respectively, interest in the cause and infamy. But it is said, the act of 1823 had created another exception, to wit: the maker of a promissory note or drawer of a bill of exchange with respect to the endorser. There is no doubt, if the Code had stopped there, that the exception previously existing would have remained in force, notwithstanding the enactment of the general rule with some enumerated exceptions; because being in *pari materiâ*, and not repugnant to that article of the Code, containing no expression of exclusion, the act of 1823 might well co-exist with the article of the Code above recited. But the article 3521, containing the "general disposition" or repealing clause, declares, that "from and after the promulgation of this Code, the Spanish, Roman and French laws, which were in force in this State, when Louisiana was ceded to the United States, and the acts of the legislative council of the legislature of the Territory of Orleans, and of the legislature of the State of Louisiana, be, and they are hereby repealed *in every case, for which it has been specially* PROVIDED *in this Code*, and that they shall not be invoked as laws, even under the pretence, that their provisions are not contrary or repugnant

The last article (3521,) of the La. Code, which repeals all laws in every *case*, provided for in the Code, itself, applies not in every particular instance or cause, but to every *category* or *class of cases*, or *subject matter* upon which the Code contains express provisions and abrogates all previous laws on these subjects.

to those of this Code." By the words "*every case*," employed in this article, we understand not every particular *instance* or cause; for the Code lays down only general rules; but we take it to mean every *category or class of cases*; or *subject matter upon which the Code contains express provisions.* The competency of witnesses is a distinct subject of legislative enactment. It is expressly and even precisely treated of by the Code, and in laying down the general rule, every *case* in a more narrow sense of the word, is provided for, which may occur in the application of the rule, or which is embraced within it. The Code lays down all the great leading principles of the law of evidence, and treatises upon that branch of the law will be found upon a careful analysis to contain little or nothing more than the developement of those principles in their application to particular cases, as they arise in practice. But the article first recited declares, who shall be a competent witness to prove *any covenant or fact*, whatever it may be, in civil matters; it makes no exception of any particular covenant or fact, whenever parol evidence is admissible under the general provision of the Code. This then is, in our opinion, a case or class of cases specially provided for.

The competency of witnesses is a distinct subject of legislative enactment. It is expressly and precisely treated of by the Code, (article 2260;) and it lays down all the great and leading principles of the law of evidence.

The article 2260 declaring who shall be a competent witness to prove any *covenant or fact*, whatever, in civil matters, makes no exception of any particular covenant or fact whenever parol evidence is admissible under the general provisions of the Code; and the act of 27th March, 1823, so far as it renders the maker of a note, &c. an *incompetent witness* in an action against the endorser, IS REPEALED by the last and repealing article of the Louisiana Code.

But it is urged, that even the sweeping clause of the act of 1828 (section 25) spared the statute of 1823, and left it in force. That section enacts, "that all the *rules of proceeding*, which existed in this State before the promulgation of the Code of Practice, except those relative to juries, recusation of judges, and other public officers, *and of witnesses, and with respect to the competency of the latter*, be, and they are hereby abrogated, &c., &c."

It appears to us quite clear, that the act of 1828, while it abrogated all the *civil* laws in force before the promulgation of the Louisiana Code, as well as all laws regulating the practice, with certain exceptions, left in force the Louisiana Code itself; and if by that Code the act of 1823, relating to the competency of wi nesses, was repealed, it is not perceived, how it could be revived by the act of 1828. The latter act left in force the law

The repealing act of 1828, left in force the Louisiana Code, and also the law respecting the competency of witnesses; leav-

then existing, respecting the competency of witnesses, leaving the question still open, whether that competency in the particular case now before us is to be determined by the Code or by the act of 1823.

But it is argued by the counsel for the appellee, that the contract, with regard to which this question arises, comes under the commercial law, and that the principles in relation to that branch of the law were to have been embodied in a distinct Code, to be designated the Commercial Code. That work has never been adopted, nor even prepared for adoption, and although it may have been the intention of the jurisconsults appointed for that purpose, to embody in it the rules of evidence, particularly applicable to commercial contracts, yet until such Code shall have been enacted, the general rules of evidence established by the Louisiana Code, must be considered as applicable to all contracts whatever, except when the Code declares otherwise.

leaving the question still open, whether that competency as relates to makers of notes and drawers of bills, &c., was to be determined by the Code or act of 1823.

The general rules of evidence established by the Louisiana Code must be considered as applicable to all contracts whatever.

It is further urged, that in the case of Flower vs. Griffith (6 Martin, N. S., 90) this court gave a judicial interpretation to the article 3521 of the Code; denying all power to the jurisconsults, who prepared the amendments of the Code, to repeal any of the former laws.

In the case referred to the court held, that the 27th title of the 3d book of the Code of 1808 was still in force, although not found in the new Code, and no provision had been made on the subject, to wit: the seizure in execution of the undivided share of a co-heir in a succession. It appeared to the court, that it was merely an unintentional omission in printing the new Code, the jurists not having proposed to change the law in that respect, as appeared by their report. The court said, "if any thing has been omitted, that omission does not prevent the law, which had already been promulgated in the old Code, from being in force. To decide otherwise, would be virtually a declaration, that the persons, who were appointed to print the Code, had legislative powers." In that case the Louisiana Code appeared to contain no provision on the subject

of the seizure of the undivided share of an heir; but in the case now before us the competency of witnesses is specially treated of, and there appears to us to be very little analogy between the two.

We are further referred to our decision in the case of Jennison vs. Wamack, 5 La. Rep., 493, in which an interpretation was given of the words *Civil Laws*, as used in the act of 1828. The court said, that the word *civil* as applied to laws anterior to the Code, must not be considered as used in contradistinction to the word *criminal*, but must be restricted as in common parlance to the *Roman Law*, and the jurisprudence of those countries, who derived their jurisprudence from it, and as distinguished from the English law or that of the other States of the Union. But we held, that a part of the act of 1808, relative to the proceedings upon prison-bound bonds was still in force, notwithstanding the act of 1828 and the Code of Practice.

This court has held (in 5 La. Rep. 493,) that a part of the act of 1808, relative to proceedings upon prison bonds was still in force, notwithstanding the repealing act of 1828, and the Code of Practice.

There is a second bill of exceptions to the admission of the protest and certificate of notice made by the parish judge of the parish of Rapides, notwithstanding the objection of the defendant's counsel, that he is the son of the plaintiff, and consequently incompetent to furnish evidence either directly or indirectly, for his father. We are of opinion, the court did not err. The notary, we think, was not incompetent to make the protest, although his father was a party to the note. In the case of Duplantier vs. Dawson, we held that the sheriff was competent to execute an order of seizure and sale, although the plaintiff was his mother; and in the case of Segur's Heirs vs. Segur, that the grand-father of a legatee is a competent witness to a testament. The court held, the official act might be valid, and yet the witness or the public officer be incompetent as a witness in any controversy growing out of the act. 14 La. Rep., 28; 15 Idem, 289.

A notary public, who is the son of one of the endorsers on a note, is not thereby rendered incompetent to make protest and give notice to all the parties.

A sheriff, who is the son of the plaintiff, in execution, is nevertheless competent to execute it.

So the grand-father of a legatee is a competent witness to a Will. The official act may be valid, and yet the public officer, be incompetent as a witness in any controversy growing out of the act.

Being of opinion therefore, that the court erred in rejecting the maker of the note as a witness, and that the case must go

WESTERN DIS. October, 1841.

MAURIN & CO. vs. ROUQUER ET AL.

back as to both the defendants, it is not necessary to enquire into the sufficiency of the notice of protest.

The judgment of the District Court is therefore avoided and reversed, and the verdict set aside, and it is further ordered, that the case be remanded for a new trial, with directions to the judge not to reject the witness Reed, on the ground of his incompetency as one of the makers of the note sued on; and that the plaintiff pay the costs of this appeal.

MAURIN & CO. vs. ROUQUER ET AL.

APPEAL FROM THE COURT OF THE TENTH DISTRICT FOR THE PARISH OF NATCHITOCHES, THE JUDGE THEREOF PRESIDING.

A sale by the father to his son, not a creditor, *of his estate*, at a sound price, where there is no privity between the latter and the creditors of his father and none between the father and his creditors, *is valid*, although the father, was insolvent at the time, and the son agreed and did apply the *price* to the payment of *a portion* of the creditors: Nor is the mere relationship of the father and son, evidence of fraud.

The sale would be good as to the son, even if it was the intention of the father to defraud his creditors, because the contract of sale was onerous and the purchase made for the full value of the property.

Actions to annul a sale, brought by a complaining creditor, for giving an undue preference to a portion of the creditors of the common debtor, are prescribed by the lapse of one year from the date of the sale.

This is a revocatory action, to set aside a sale of *his estate* made by F. Rouquer, the father to J. B. O. Rouquer, his son, on the ground of undue preference given to some creditors over the plaintiffs, who are complainining creditors. They allege that on the 16th Jan., 1839, the father by public or notarial act made a sale of a plantation and slaves comprising all his estate to his son, who agreed and has actually paid from the price thereof, the de-

mands and debts of sundry creditors of his father in fraud of the rights of the petitioners. They show that they obtained a judgment against F. Rouquer in November, 1839, about ten months after this sale, for $10,000, and have not been paid and can find no property out of which to satisfy their judgment.

This suit was instituted the 24th October, 1840, nearly two years after said sale. The plaintiffs allege it is fraudulent and made in fraud of their rights, and they pray that it be annulled and the property made subject to their demand.

The defendants severed in their answers. Young Rouquer pleaded the general issue; averred that the sale was fair and just, for the full value of the property and that he had in accordance with the contract, assumed and paid debts of his vendor to the amount of $10,123; and has had the possession and entire control of the said estate as owner. Rouquer, the father, denied all fraud and averred the sale was fair and bona fide.

The creditors who had been paid were made parties and denied all fraud or any privity as to the sale between the father and son, or with either of them.

The plea of prescription of one year from the date of the sale *before suit*, was interposed.

On all the evidence adduced under these issues and pleadings, there was a verdict and judgment for the defendants. The plaintiffs appealed.

Boyce & Dunn, for the plaintiffs and appellants, contended that F. Rouquer was insolvent at the time of this sale, to the knowledge of his son; and the son in fact acted as agent of his father in the payment of a portion of the creditors; which was giving them an undue preference over the plaintiffs, who were also creditors and have not been paid a cent. It is a fraudulent sale as respects the complaining creditors and null as to them.

Roysden, for the defendants, insisted the sale was valid. It was made to young Rouquer, who was not a creditor, and be-

WESTERN DIS. *October*, 1841.

MAURIN & CO. *vs.* ROUQUER ET AL.

fore the plaintiffs' had any judgment against the father. It was fair and bona fide and there is no cause of nullity.

Garland, J. delivered the opinion of the court.

The petitioners represent that on the 22d day of November, 1839, they recovered a judgment against François Rouquer for $10,000, with interest and costs, that an execution issued on the same, which has been returned *nulla bona*. That said Rouquer being insolvent, with a view to protect his property from his creditors, and particularly the plaintiffs, had by an authentic act sold and conveyed to his son and co-defendant, Jean B. O. Rouquer, an emancipated minor, the plantation on which he, François, resided, with the improvements and two slaves. In which sale provision is made for the payment of certain preferred creditors, all of which is illegal, fraudulent and void. That young Rouquer knew at the time of the sale, his father was insolvent, and purchased the property with a view to defraud them. That since the purchase young Rouquer has paid the other creditors of his father, but will not pay petitioners, but keeps the property which is liable for this debt. The prayer is, that the sale made on the 16th day of January, 1839, of the land and slaves be annulled as fraudulent, and that the same be returned to the mass of the estate of F. Rouquer and made liable to the payment of his just debts.

The defendant, J. B. O. Rouquer, for answer denies any fraud. He says he is not and never was a creditor of his father, that as a purchaser in good faith and for a valuable consideration, he bought the plantation and slaves for $16,000. That in accordance with his contract he has paid various creditors of his father, $10,123, from which sum as a portion of the consideration of the sale, his said father has released him, and he has given up the evidence of those claims; he names the creditors he has paid and the respective amounts paid to each.

The act of sale, dated on the 16th January, 1839, declares that in consideration of $16,000. F. Rouquer sells and delivers to his son the tract of land mentioned with the farming utensils,

&c.; "ten thousand dollars whereof are to be applied to the payment of debts due by the vendor at such times and on such terms as the purchaser shall agree upon with the creditors of the vendor," and the balance to be paid the vendor in various instalments. The vendee is also to furnish the vendor with the necessaries of life until the $10,000 is paid or settled, for which he is to have credit. J. B. O. Rouquer, at the same time sells his father the undivided half of three slaves in part payment of the tract of land, &c. In this act no creditors are named or any specific sums mentioned as due to any one, no creditor signs the act or seems to have known any thing about it, except one who was accidentally in the notary's office, but took no part in the transaction.

On the same day, F. Rouquer also sold and conveyed by public act to his son two slaves, for which he was to pay A. Sompeyrac, tutor, &c., the price for which they had been sold by him to the elder Rouquer, which was unpaid. This price and interest, it was ascertained afterwards, amounted to about $3080. This amount young Rouquer was to have credit for on the price of the land, and it formed a part of the $10,123, hereafter mentioned. To this contract Sompeyrac was no party.

After these contracts were made, young Rouquer went to the different creditors of his father, and by payments or assumption of his engagements, obtained from them the notes or other evidence of debts they held, and took them to his father, who, on the 13th day of August, 1839, went again before the notary and passed another act acknowledging the receipt of $10,123, and the vouchers for it, in part payment of the plantation previously sold. In this act the name of each creditor is mentioned together with the sum paid. On the same day young Rouquer gave his father four notes for the balance of the price of the land, to wit: $5877, payable in four annual instalments. This act was passed about three months before Maurin & Co., obtained judgment against F. Rouquer on his endorsements for Cortez, Laplace & Co.

At the time these acts were passed it was well known that

WESTERN DIS. *October*, 1841.

MAURIN & CO. vs. ROUQUER ET AL.

F. Roquer was in embarrassed circumstances. He estimated his individual debts at about $10,000, but they turned out to be several thousand dollars more. He had property to the amount of about twenty or twenty-two thousand dollars. If he could get clear of his endorsements to the plaintiffs for Cortez, Laplace & Co., for which suits were afterwards commenced, he would be solvent, if not he was clearly insolvent. The evidence to show that young Rouquer knew his father was insolvent is by no means clear, but it is certain he knew he was much embarrassed.

The plaintiffs obtained a judgment against F. Rouquer on the 22d of November, 1839, and it not being satisfied they commenced this suit on the 24th of October, 1840, more than twenty-one months after the sale from Rouquer to his son had been made, and about fifteen months after the latter had paid the creditors of the former and been discharged from so much of the price. The evidence shows the property sold for its full value and that young Rouquer has ever since had the sole management and control of it, though his father lives on the place being old and dependant on his son.

There was a mis-trial in the case in November, 1840, after which the plaintiffs amended their petition by leave of the court, and made all the creditors to whom young Rouquer had made payments on account of his father, parties to the suit; alleging they were aware of the insolvency of F. Rouquer on the 16th January, 1839, and that young Rouquer acted as *their agent* in making the purchase aforesaid, and that it was a conspiracy among all the parties to obtain an unjust preference over the plaintiffs. They therefore pray these creditors be cited, and copies of the original petition and amendment be served on them; that the sale be annulled and each of these new defendants be compelled to return the amounts they have received and that they be paid *pro rata*. The service of this petition was acknowledged by or served on different parties at various dates from November 30th, 1840, to April 2d, 1841.

These defendants appeared and answered by a general de-

nial. They say, they had nothing to do with the sale; that young Rouquer had settled his father's debts with them. They deny all fraud or intention to obtain any unjust preference and they, with the original defendants, plead prescription to this suit.

On the second trial a good deal of evidence was introduced to show François Rouquer was insolvent at the time he executed the act of sale, and as much was received to show he was not insolvent, but only embarrassed. The result of it all is, that including his endorsements in favor of the plaintiffs, there is no doubt he was insolvent; if he should not be obliged to pay those endorsements, then he was solvent. It is in evidence, that at the time the plaintiffs had not commenced a suit against him on his endorsements, but the notes had been protested. Whilst the parties were at the notary's office for the purpose of passing the act of sale, the elder Rouquer made an estimate of his debts amounting to about ten thousand dollars and it is further shown, that about that time, he had no serious apprehensions that he would suffer by his endorsements for Cortez, Laplace & Co., as he relied on their assurances that their notes endorsed by him would be discharged by them. To rebut this the plaintiff offered evidence to show that at the time of the sale Cortez, Laplace & Co. were notoriously insolvent, and Rouquer could therefore not have had any sufficient reason to believe they would or could pay their notes. To this the defendants objected and the court refused to receive the testimony to which the plaintiffs excepted. The court very probably erred, but it is not material in this case, as we are of opinion the evidence could not affect the judgment which has been given.

All the debts of the elder Rouquer paid by his son were established on the trial, and amount to the sum for which the release was given, and no evidence was given to prove he acted as the agent of the creditors.

There was a verdict and judgment for the defendants and the plaintiffs appealed.

WESTERN DIS. *October*, 1841.

MAURIN & CO. *vs.* ROUQUER ET AL.

When this sale was passed in January, 1839, it is not shown there was any privity or agreement between young Rouquer and the creditors, or between the elder Rouquer and those persons. The son was not a creditor of the father and the mere relationship is not evidence of fraud; 9 Martin, 654; 1 Martin, N.S., 535. The sale must therefore be considered as one made in the ordinary course of business, not to a creditor and therefore good; La. Code, art. 1981; 6 La. Rep., 344; 12 Idem, 266; 16 Idem, 150. The contract would be good as to young Rouquer even if it was the intention of his father to defraud his creditors, as the contract was an onerous one and the purchase made for the full value of the property; La. Code, 1973-74-76; 10 La. Rep., 345, 348. The agreement on the part of young Rouquer to pay ten thousand dollars of the debts owing by his father and his actual discharge of them by payment or novation, and the giving his notes for the balance of the price, is a valid consideration for the sale; 6 La. Rep., 536. If the plaintiffs have been injured by these payments to, or arrangement with the creditors, they cannot annul the sale on that account; but if any thing is wrong they must call on the creditors themselves. This they seem to have become aware of, after the first attempt at a trial, and then by the amended answer, the former creditors are called into the suit, and the agency of young Rouquer alleged.

The sale would be good as to the son, even if it was the intention of the father to defraud his creditors, because the contract of sale was onerous and the purchase made for the full value of the property.

Supposing it to be as asserted but not proved, that young Rouquer was the agent of the creditors, we cannot see how the plaintiffs can resist the plea of prescription tendered by the defendants. The article 1982 of the La. Code, with the decisions of this court in 3 La. Rep., 26: 14 Idem, 321; settle that question. The only ground of nullity in this case, is that an undue preference has been given to a portion of the creditors of François Rouquer. Actions based on that ground alone come under the prescription contained in the article cited, and must be brought within a year from the date of the act sought to be revoked.

Actions to annul a sale, brought by a complaining creditor, for giving an undue preference to a portion of the creditors by the common debtor are prescribed by the lapse of one year from the date of the sale.

The judgment of the District Court is therefore affirmed with costs.

INDEX

OF THE

PRINCIPAL MATTERS.

ADMINISTRATOR.

PAGE

1. In an action to remove an administrator for misconduct or mal-administration, it is necessary, that all the heirs of the estate under administration join in the suit; such removal may be prayed for by any of the heirs.

Kendrick's Heirs vs. *Kendrick.* 31

AFFIDAVIT.

1. Where an attorney at law makes affidavit for an attachment, he need not state, that he is attorney in fact. ..... *Austin et al.* vs. *Latham.* 88

2. An affidavit for a new trial on the grounnd of newly discovered evidence, is insufficient, if it does not state the evidence was not discovered since the trial. .. *ib.*

APPEAL.

1. The damages allowed by law to the appellee for a frivolous appeal or one evidently taken for delay, will not be given, unless they are claimed in the answer to the appeal. ..... *Lee & Hardy* vs. *Palmer et al.* 25

2. The appeal will be dismissed, when there is nothing by which the judgment below can be tested. ..... *Healy* vs. *Wagners.* 91

3. When an appeal is not clearly suspensive, it will not be dismissed on the ground of insufficiency in the amount of the bond, when it covers costs.

McKown vs. *Mathes.* 542

4. The signature of the parties to a blank appeal bond is binding on them and may be filled up afterwards, to operate a suspensive appeal.

State of Louisiana vs. *Judge of the First District.* 174

5. When a suspensive appeal is once granted and bond signed accordingly, the jurisdiction of the judge *a quo* is at an end, after ascertaining the security is good. ..... *ib.*

6. Appeal for delay and final judgment affirmed with the maximum of damages. ..... *Pumphrey* vs. *Prescott et al.* 345

PAGE

7. An appeal will not be dismissed, for want of citation of appeal, when it was caused by the fault of the appellee.

Anderson's Administrator vs. *Birdsall's Administratrix.* 441

ATTACHMENT.

1. Where the attachment is dissolved, it is at the costs of the plaintiff, and the judgment should so state it, although the case is tried on the merits, by the appearance of the defendant, and judgment goes against him.

McKown vs. *Mathes.* 542

ATTORNEY.

1. Where the attorney at law makes the affidavit for an attachment, he need not state, that he is attorney in fact. ..... *Austin et al.* vs. *Latham.* 88

AUCTION SALES.

1. Where the terms of an auction sale are changed, or new conditions imposed, from those advertised, by proclaiming them at the stand at the commencement of the sale, the purchaser is not bound by them, and a re-sale cannot be made at his risk. ..... *Nott & Co.* vs. *Oakey et al.* 18

2. A purchaser at the first sale, declining to comply with a new condition not published in the auction bills, but proclaimed at the stand by the auctioneer, is at liberty to bid and become a purchaser at the second sale, without regard to his first sale. ..... *ib.*

3. Purchasers at auction are not bound by new conditions proclaimed verbally from the stand by the auctioneer, different from or more onerous than those advertised in the auction bills. ..... *Nott & Co.* vs. *Bank of Orleans.* 22

BAIL BONDS.

1. On the failure of the accused to appear when called on the second day of the term, judgment *ni si* only is to be entered, which may be *set aside* during the same term, on the appearance of the party accused. ..... *State* vs. *Cotton.* 550

2. So where a party accused and his sureties failed to appear on the second day of the term and a judgment was entered up against them; and afterwards, but during the term, the principal surrendered himself: *Held*, that the judgment should have been set aside on his appearance in court. ..... *ib.*

BILLS AND NOTES.

1. The endorser has a right to recover the damages which he has paid on a protested bill of exchange, from the acceptors, through whose fault his liability as endorser, had attached. ..... *Shields et al.* vs. *Paul.* 72

2. The gratuitous refunding by the holders, to an endorser, damages on a protested bill paid by him, confers no right on the acceptors to recover them from him, although they had also paid or refunded to him, on judgment rendered. ..... *ib.*

PAGE

3. Presentation and demand of the "book-keeper," of the makers of a note, at their counting room, is sufficient demand, without giving the name of the clerk or book-keeper.....*Austin et al.* vs. *Latham.* 88

4. So notice of protest left "on board the brig A. with the mate, which vessel he commands," is sufficient to bind the endorser, without naming the mate.... *ib.*

5. The endorser cannot complain that he received earlier notice by sending it on board his ship, than if sent by mail as required by law..... *ib.*

6. The endorsement of defendant need not be proved when he does not specially deny it..... *ib.*

7. Where a promissory note is given for a balance of account in an action between the original parties, the debtor may go into the consideration and contest the account, but the burden of proof is on him to show affirmatively errors or omissions.....*Flower* vs. *Millaudon.* 185

8. Where the owner of property places it in the hands of a third person who makes advances on it by drawing a bill, the drawee and consignee cannot appropriate it to the payment of his debt against the owner, until the advance is paid.....*Zacharie* & *Co.* vs. *Rogers* & *Harrison.* 218

9. Drawees who are under no obligation to accept a draft, bind themselves to pay it, when they receive the goods, or property on which it is drawn..... *ib.*

10. The acceptance of a draft merely by the receipt of the bill of lading, and the property on which it is drawn, completes the obligation of the drawee to pay it..... *ib.*

11. Where the admissions and declarations of the payee and endorser of a note, that he *transferred* it to the plaintiff, are *proved* by witnesses, it is sufficient to authorize a recovery, without actual proof of his signature.

M'Kown vs. *Mathes.* 542

12. Where it is shown that the plaintiff sues as agent, or for the benefit of the payee of a note, the maker may set up every equitable defence he may have against the payee..... *ib.*

13. Where notes are given for the price of property producing fruits and revenues, are by agreement or otherwise to remain deposited and payment suspended, until certain defects in the title are cured, on their restoration, payment of the interest arising *ex-morâ* will be decreed as a compensation for the fruits of the thing sold, when it remains in the enjoyment of the vendee.

Ball et al. vs. *Le Breton et al.* 147

14. The purchaser who wishes to relieve himself from the payment of interest, must avail himself of the faculty given him to deposit *the price due* by him..... *ib.*

15. Where the purchaser is actually disturbed in the possession and enjoyment of the thing sold, he can require security before payment of the price can be demanded..... *ib.*

16. Usurious interest which has been paid cannot be recovered back.

Kenner & *Co.'s Syndic* vs. *Holliday et al.* 154

17. The mere taking a new security or bill which does not mature until after the one sued on becomes due, is not such an agreement to give time as will release the endorser or which suspends the remedy or rights of the holder.

Buckner, Stanton & *Co.* vs. *Watt.* 211

PAGE

18. It is not sufficient to show that in point of fact no damage was sustained by the neglect of the holder of a bill of exchange, to give notice of its dishonor in order to hold the drawer liable after its acceptance.. *Williams* vs. *Brashear.* 390

19. Where the drawer has no funds in the hands of the drawees and has no right to expect his bill will be paid, there being no commercial transactions between the parties, notice of non-payment and protest is unnecessary..... *ib.*

20. But where there are running accounts between the drawer and drawees to induce the former to believe his bill will be honored, he is entitled to notice of non-payment, although in fact he had no funds in the hands of the drawees. *ib.*

21. Two witnesses are required, not only to the protest, but to the record of the certificate of the notary, under the act of 1821; and this is not superseded by that of 1827; both of which require the *certificate* of protest to be attested by two witnesses, to be *evidence* of notice.

Gas Light & Banking Company vs. *Nuttall.* 447

22. The certificate of the notary must be recorded and attested by two witnesses, to be admissible as evidence of notice..... *Gas Bank* vs. *Phelps.* 452

23. Where the last day of grace for the payment of a note or bill, is a Sunday or day of rest, the protest is properly made on the preceding day.

Huie vs. *Brazeale.* 457

24. Personal notice of protest may be made on the endorser at any place, however distant from his domicil; and personal notice dispenses with constructive notice, by sending it through the post office..... *ib.*

25. Where the certificate expresses the name of the post office, to which notice to the endorser is sent, it is sufficient, without stating it is the *nearest* to his residence. A denial might, perhaps, put the adverse party on his proof, that it was the nearest..... *Gas Bank* vs. *Desha.* 450

26. The want of amicable demand cannot be pleaded, when the protest states that demand was made of the makers of the note, and the endorser notified that he would be looked to for payment..... *ib.*

27. Bankable interest is due on notes discounted in Bank, from the day of protest..... *ib.*

28. The fact of an endorser taking a mortgage from the maker of a note to indemnify him against loss, does not dispense with demand, protest and notice.

Peets vs. *Wilson.* 478

29. Where the plaintiff took the defendant's note endorsed in blank by the payee and before due, but with a knowledge of the equities existing between the original parties, amounting to a failure of consideration, he failed to recover.

Jones vs. *Young.* 553

BOUNDARY.

1. The southern and south-west boundary of the county and parish of Natchitoches runs from the junction of the *Rigolet de Bon Dieu* and Red River, in a direction as far south of west as will strike the Sabine River at the point where the north-west corner of the county of Opelousas touches the western bank of that stream..... *Lecomte* vs. *Smart.* 484

PAGE

2. In settling and determining boundaries not fixed by actual observation and survey, some weight must be given to the general understanding and common acquiescence. ..... *Lecomte* vs. *Smart.* 484

CITATION.

1. A sheriff is presumed to be acting in and executing the process of his own parish, when the contrary is not shown; and he is not required to insert the name of his parish in his returns or in making service of citation.

Kendrick's Heirs vs. *Kendrick.* 36

2. The law dispenses with personal service, when the defendant is absent; but the sheriff's return must state expressly, that he left the process at the *usual domicil* or residence, with a free person above fourteen years of age, *living there;* the defendant being *absent.* ..... *ib.*

3. The citation should state, that the answer is to be filed within *ten days after service;* allowing *one day* for every ten miles distance from the residence of the defendant to the clerk's office. ..... *ib.*

CLERKS.

1. The certificate of the clerk of a court cannot be taken as proof of *the purport* of papers of record in his office, much less of such as are missing.

Briggs, Lacoste & *Co.* vs. *Campbell.* 524

COMMUNITY.

1. Property received as a donation from the Spanish government by one of the spouses, does not enter into the community; but remains his separate property, and descends to his heirs as such.

Fuselier's Heirs, f. p. c. vs. *Masse's Heirs, f. p c.* 329

2. Property purchased during marriage by the husband, in his name, though bought with the funds of the wife, belongs to the community. So a slave received by the husband, in his own name, in discharge of a sum, which the wife inherited, is community property, as likewise the increase of the slave after the sale. ..... *Comeau* vs. *Fontenot.* 406

3. It has been held, that property acquired by the wife, as a *datien en paiement,* made to her by her tutor, and which never came under the administration of her husband, constitutes the wife's separate property; and does not belong to the community, but is paraphernal. ..... *ib.*

4. Where a woman has her domicil here, and marries in another State, it does not prevent a community of acquests and gains from existing, when the parties afterwards remove to Louisiana. ..... *Rowley* vs. *Rowley.* 558

5. In a judicial sale of property for a partition among several heirs, the husband of one of them may purchase the entire property sold, which becomes community from that time; he being responsible to the wife for the price of her share only. ..... *ib.*

6. Where, in a purchase by the husband, the portion of the wife in the estate sold is imputed to the extinguishment of the price to be paid by him, he is bound

PAGE

to her for it, with a legal mortgage to secure it, if he administers her paraphernal estate..... *Rowley* vs. *Rowley.* 558

7. If the wife have a fortune, and is in the administration of it, and the husband little or none, she is bound to pay or contribute at least half of the matrimonial charges..... *ib.*

8. The wife is not entitled to interest on recovering her paraphernal property, when the husband administers it, or when it is administered indifferently by the husband and wife; as the fruits of paraphernal property, except the young of slaves belong to the community..... *ib.*

CONFLICT OF LAWS.

1. So a statute of this State derogating from the established rules of evidence among nations, will be executed and obeyed as to contracts made in other States, when they are sought to be enforced here..... *Buckner, Stanton & Co.* vs. *Watt.* 216

CONTINUANCE.

1. A continuance will not be allowed, when due diligence has not been used to obtain the testimony of a witness, alleged to be material.
R. McCarty vs. *J. P. McCarty.* 296

2. Motions and affidavits for continuances are addressed to the legal discretion of the court and should be granted or denied, so as to effect a speedy termination of suits, as far as is consistent with justice..... *ib.*

3. It is no ground for a continuance, that a witness is insane, and time is asked, that he may recover, and his deposition be taken; especially when it is not shown he would be able to testify in a reasonable time.
Anderson's Administrator vs. *Birdsall's Administratrix.* 441

4. When the answer sets up a special contract, a continuance need not be allowed for the party to procure the testimony of a witness, as it is unimportant to the defence to prove one..... *ib.*

5. Upon affidavit made, and in consideration of its being the first term, a continuance should be allowed; but if on appeal it appears, that by the admissions of the adverse party, &c., no injury is sustained by going to trial, the case will not be remanded on this account..... *Rowley* vs. *Rowley.* 557

CONTRACTS.

1. The court will not presume, that parties make use of words in their contracts, to which no meaning is attached by them. Some effect is to be given to every word if possible; and but rarely will the court reject words or phrases in a contract as surplusage..... *Rolland's Heirs* vs. *McCarty.* 77

2. Where the act of sale of a lot conveys the object sold without any exception or reservation, together with "the privileges, rights and pretensions which belong to it; and if the extent be greater than is mentioned, it shall be for the advantage of the purchaser," every thing and all accretions, present and future, pass thereby..... *ib.*

PAGE

3. Where there is no privity of contract, between the plaintiff and defendant the latter cannot be put in delay.

Agricultural Bank of Mississippi vs. *Barque Jane.* 1

4. Where a contract is made for the sale of a quantity of cotton in bales, for such a price as two brokers chosen by the parties shall name, the moment the brokers agreed upon the price, the sale was complete, and no new conditions could be imposed. ..... *Chevremont* vs. *Fulton et al.* 248

5. Contracts are to be decided by the law of the place where made; but there is an exception, which is, that no nation is bound to recognize or enforce contracts, which are injurious to its interests or people.

Buckner, Stanton & Co. vs. *Watt.* 216

CURATORS OF ESTATES.

1. Where the curator fails to comply with his duties, and pay over money, any creditor of the estate may at once resort to his action on the curator's bond against the surety. ..... *Bonny & Baker* vs. *Brashear.* 383

2. So where an estate is shown to be solvent, a creditor may sue the curator or his surety, on their bond, for the whole amount of the claim, without waiting for a distribution, when there is delay, or for other creditors to come in. ..... *ib.*

3. The fee of attorney of absent heirs is chargeable to their share of the estate and to the estate itself. ..... *Hisem* vs. *Lemel's Curator.* 425

4. The cost of erecting tombs over the grave of the deceased, forms no part of the funeral expenses, and the curator has no authority to expend the means of the estate for this purpose without the consent of the heir. ..... *ib.*

5. Where the curator, in compliance with a verbal request of the deceased in his last sickness, and with the implied assent of the heir, erects tombs over the deceased and his wife, he will be allowed the sum expended, in his account against the estate. ..... *ib.*

6. Where a claim against an estate is unliquidated, or the curator objects and refuses to approve it, the party may sue on it in the Court of Probates; but he cannot have execution immediately, as it must be paid concurrently with other creditors. ..... *Anderson's Administrator* vs. *Birdsall's Administratrix.* 441

7. Claims against estates in the course of administration, bear *legal* interest from the time they are due and payable, although unliquidated. ..... *ib.*

8. A surety is only liable for the acts of the curator during the continuance of his bond; and for the proper application of the funds received during that time.

Brown vs. *Gunning's Curatrix et al.* 462

9. The action on a curator's bond against the sureties, is not prescribed by the lapse of one year. It is an action *ex contractu.* ..... *ib.*

DONATION.

1. Where the defendant made a verbal donation of a slave to his son, and at his death, as one of a family meeting advised the sale of the slave, as the pro-

PAGE
perty of the minor child of the deceased, he cannot claim back either the slave or the proceeds, although the donation *per se* did not divest him of title.
Gillispie vs. *Day*. 263

2. The donor is only entitled to the reversion of the thing donated, when the donee *dies without posterity*, and it is found in his succession..... *ib*.

3. The capacity of the donor to give, in relation to donations *mortis causâ*, reference must be had to the time of the donor's death, because it is not until then that the donation takes effect..... *Criswell* vs. *Seay et al*. 528

4. So where the husband, having then two children, makes a donation or disposition *mortis causâ*, in his marriage contract, of all the property of which he may die possessed, and which he may lawfully dispose of, to *his intended wife*, if she survives him; and his children die first, leaving no forced heirs, at his death *his wife becomes his universal donee*, and is entitled to his estate. *ib*.

EVICTION AND WARRANTY.

1. Where the purchaser is actually disturbed and in danger of eviction of the thing sold, he may require security, before payment of the price can be demanded: But being in possession and enjoyment of the property, he must pay interest, or consign and deposit the price..... *Ball et al.* vs. *Le Breton et al.* 147

2. The creditors of an estate are not bound to give security to the purchaser, before coming on him for claims due by it, on the ground that he is in danger of eviction. The right to call on a party to give security, implies a warranty against eviction..... *Kenner & Co.'s Syndic* vs. *Holliday et al.* 154

3. The Roman law in laying down a general rule on the subject of warranty, provides that the purchaser must be indemnified to the *extent of the interest*, he had in not being evicted; on this, there are some restrictions.
Edwards et al. f. p. c. vs. *Martin's Heirs et al.* 284

4. In regard to agreements having for their object certain quantity or amount, as in sales, leases, &c., the damages were not to exceed the value of the subject matter of the contract..... *ib*.

5. A debtor engaging to pay damages for the non-payment of his obligation, is presumed to intend only the highest damages within the contemplation of the parties at the time of the contract; and if they are such as could not have been foreseen, they must be reduced to a reasonable sum..... *ib*.

6. The principles of the Roman law, which never had the force of positive law in this country, but which are founded in equity and reason, will be adopted as rules regulating the indemnity to which a party is liable on his warranty. *ib*.

7. So it is impossible that parties ever contemplated that the damages in case of eviction should be larger than the value of the subject matter of the contract. *ib*.

8. So where the vendee of a female slave purchased in 1802, was evicted and the vendor refunded the price; is afterwards evicted of her increase or children, the vendor is only bound for damages to the amount of the value or original price of said slave; and not the value of the young slaves, born of her after the sale, although much greater..... *ib*.

9. A warrantor in case of eviction of the purchaser, does not owe interest in

PAGE

the same manner as the purchaser who withholds the price of a thing which produces fruits. ..... *Melançon's Heirs* vs. *Robichaud's Heirs.* 357

10. The warrantor who is not in possession of the property is only bound among other obligations to re-imburse the purchase money; or a proportion of it; and he owes interest after he is put *in morâ*, or from judicial demand; or if the debt is unliquidated, only from the rendition of judgment. ..... *ib.*

11. Fees which parties have to pay to their counsel for asserting their rights in courts of justice, have never been, nor can they be considered as costs, chargeable to the party cast. It is only taxed costs which a warrantor is bound to reimburse to his vendee. ..... *ib.*

12. Where a third person is interposed and sued as a trespasser, and disturbing the plaintiffs in their possession and title to land, and the vendors of the plaintiffs are called in warranty, they will be discharged and released when it is shown the action against the immediate defendant is simulated, or when the suit fails or is not prosecuted as to him. .... *Parrott et al.* vs. *Edwards et al.* 336

EVIDENCE.

1. Proposals for a compromise or conversations about it are not generally admissible in evidence; but if any fact or distinct liability is admitted, evidence of it may be given, allowing the party the benefit of all the propositions or conversations which took place.

Agricultural Bank of Mississippi vs. *Barque Jane, &c.* 1

2. An agreement proved by the positive testimony of one witness supported by many strong corroborating circumstances, will control the price of slaves as agreed on, against the price they were subsequently sold for at sheriff's sale.

Flower vs. *Millaudon,* 185

3. Evidence which is inadmissible to prove title, may be received to show possession by known marks and boundaries, which is good to sustain the plea of prescription. ..... *Broadway's Heirs* vs. *Pool.* 258

4. A witness testifying to the extra judicial confessions, verbally made, of a deceased person, is the weakest of all testimony; as it cannot be contradicted, or the witness convicted of perjury if he swear falsely. ..... *Gillispie* vs. *Day.* 263

5. So, proof by one witness to a single confession of an aggregate amount above 500 dollars is insufficient without some corroborating circumstance; although if the witness testified of his own knowledge to two successive loans, or sums, amounting together to more than $500, the evidence might be received as sufficient. ..... *ib.*

6. Positive testimony cannot be destroyed by the negative proof of witnesses who testified that they did not see a certain slave on board defendant's steamboat.

Slatter vs. *Holton.* 39

7. Ancient plans of a city are admissible in evidence to prove the boundaries of lots sold in reference thereto, and the direction of streets so far as they may extend, although not including the *locus in quo*; and especially when one of the parties claim under those who caused the plans to be made.

Carrollton Rail Road Co. vs. *Municipality No.* 2 62

PAGE

8. The acceptance of accounts by the party to whom rendered is *prima facia* evidence of their correctness, and it is for him to show errors. The burden of proof is on him. ..... *Flower* vs. *Millaudon.* 195

9. Testimony contained in a deposition must be disregarded which goes to show any thing contrary to or explanatory of a judgment between the parties; but may be proper to prove that one of the parties was in possession of a separate estate. ..... *Skipwith* vs. *His Creditors.* 198

10. The record of a suit and judgment is admissible in evidence to show it was rendered against a party who had surrendered certain slaves to be sold although it might be insufficient *per se* to prove she had title to them. ..... *ib.*

11. Acts or deeds under private signature, acknowledged before the mayor of a city are inadmissible in evidence when it is not shown he had authority to take the acknowledgments of witnesses to such acts or deeds. ..... *ib.*

12. The record of a suit pending in the Supreme Court of another State is inadmissible in evidence when it is irrelevant and tends to controvert a judgment between the same parties in this State. ..... *ib.*

13. This court cannot receive as evidence in a case, any thing which the judge *a quo* states in his opinion to have been proven. An admission of material facts cannot be proved by any mention in the judge's opinion, that such admissions were made. ..... *Broussard* vs. *Broussard.* 354

14. Evidence not pertinent to the issue may be admitted and the effect of it be afterwards considered. ..... *Davis* vs. *Police Jury of Concordia.* 533

15. In a claim for right of ferry, evidence is admissible to show, the land purchased was not worth the price paid, without the right of ferry was attached to it. The effect of it should be considered with other circumstances. ..... *ib.*

16. Where the right of ferry depends on a condition, evidence should be received to show the condition has not been performed. .... *ib.*

17. The certificate of the commandant, stating that a certain road was made, as required by the condition of a grant of the perpetual right of ferry, is not conclusive, but only *prima facia* evidence of the fact, which may be contradicted. ..... *ib.*

18. Evidence is admissible to show that a ferry, which is claimed under an exclusive grant from the Spanish government, was in fact kept under the control and supervision of the Police Jury. .... *ib.*

19. Instruments of writing, such as grants, certificates, &c., are admissible in evidence, without proof of their signatures. They are *prima facia* evidence; and may be contradicted by showing, that they were not acting in the capacity they purport. .... *ib.*

20. The transfer of a grant or privilege may be proved by comparison of handwriting, when the signature of the witness is shown to be genuine, and he is dead. *ib.*

21. The authority of a deputy clerk to issue an attachment, when denied, should be clearly established by evidence. .... *M'Kown* vs. *Mathes.* 542

22. Conversations between the husband and wife out of the presence of the defendant, who was not privy to the sale or transaction to which they relate, are inadmissible in evidence. ..... *Blanchard* vs. *Castille.* 362

23. Threats and undue influence of the husband, to induce his wife to sign an act of sale of her paraphernal property to B., even if sufficient to annul it

PAGE

as between them, cannot affect the rights or be given in evidence against C., a *bona fide* purchaser from B. ..... *Blanchard* vs. *Castille.* 362

24. A third person who did not sign a notarial act of sale, although it expresses on its face, that the *price* was paid by the vendee, *in cash*, may show by parol evidence, that in fact it was paid partly in cash, which he advanced, and by his note for the balance. ..... *Benoit* vs. *Broussard.* 387

25. Where the testimony of the witnesses is contradictory and the evidence nearly balanced, the opinion of the judge *a quo* will have great weight. ..... *ib.*

26. Parol evidence is admissible in contradiction to the written statement of the defendant, intended as a settlement between the parties, and also of title to a slave, under the pleadings alleging fraud. ..... *Brownson* vs. *Fenwick.* 431

27. Evidence taken down at the instance of the plaintiff, cannot be stricken out, on the cross-examination, on the ground that it contradicted or went to explain a written contract and was inadmissible. The motion to strike it out came too late; the objections should be stated when the testimony is offered.

Huey vs. *Drinkgrave.* 482

28. Parties are not to be controlled in the order in which they adduce their proofs on the trial: so in the transfer of a note, the defendant may examine witnesses to prove the existence of equities between the original parties affecting the consideration, and afterwards to show by evidence that the plaintiff took the note with a full knowledge of their existence. ..... *Jones* vs. *Young.* 553

29. The general rules of evidence established by the Louisiana Code must be considered as applicable to all contracts whatever.

Waters vs. *Petrovic* & *Blanchard.* 482

FACTORS AND COMMISSION MERCHANTS.

1. Where factors accept a mandate to receive produce and make insurance on it at the instance of the shippers, they are bound to pay his draft on it, instead of imputing the proceeds to the payment of debts due them by the former owner. They can only apply the surplus of the proceeds of the cargo to their own debts after payment of the draft drawn against it.

Zacharie & *Co.* vs. *Rogers* & *Harrison.* 223

2. Where a commission is charged for *accepting*, none can be claimed, or a like commission charged for advancing, on the same sum or transaction.

Taylor, Gardner & *Co.* vs. *Wooten.* 518

3. A promise by defendant to send plaintiffs his crop, or in default, to allow them a commission on its amount, having no other consideration than the acceptance of a draft, for which a commission is already charged and allowed, is a *nudum pactum*, and will not be enforced. ..... *ib.*

4. Where the owner of property places it in the hands of a third person who makes advances on it by drawing a bill, the drawee and consignee cannot appropriate it to the payment of his debt against the owner, until the advance is paid.

Zacharie & *Co* vs. *Rogers* & *Harrison.* 218

FRAUD AND SIMULATION.

1. Where land is alleged to have been conveyed with a view to give the vendee

PAGE
an apparent title, to enable him to recover in a petitory action; that the vendors were to have one-half when recovered; and that no price was really paid; such a stipulation can only be shown by a counter-letter.
Delahoussaye's Heirs vs. *Davis's Widow and Heirs.* 409

2. A simulation not fraudulent cannot be proved by parol, as between the parties; and if fraudulent as to both parties, the law gives no action to enforce such contracts..... *ib.*

FREIGHTS AND VESSELS.

1. The freighters of a vessel under charter party, have no claim on the owner for damages, alleged to have been occasioned by the accidents, &c., of the voyage. There is no privity between the freighters, who contract with the charterers, and the owner.....*Agricultural Bank of Mississippi* vs. *Barque Jane.* 1

2. The payment of privileged claims against a vessel, does not subrogate the persons paying, as privileged creditors, when there is no conventional subrogation..... *ib.*

3. The master of a vessel, even under charter party, is bound to consult the owner, in the home port, when necessary or extensive repairs are to be made... *ib.*

INJUNCTION.

1. The debtor alone has a right of enjoining proceedings under executory process without giving security. His vendee or the third possessor of the mortgaged property cannot.....*Pepper et al.* vs. *Dunlap.* 491

2. On the dissolution of injunctions the damages should only be estimated on the amount actually due at the time of granting the injunction, or the *sum actually enjoined*, and not on notes or instalments of the same debt becoming due during the pendency of the injunction..... *ib.*

3. The plaintiff in injunction, who is non-suited, is entitled to a suspensive appeal on giving his bond for the amount of the costs, and one half over.
State of Louisiana vs. *Judge of the First District.* 167

4. In an injunction case to restrain the adverse party from taking out an order of seizure and sale, when the plaintiff is non-suited, a writ of prohibition will be granted to the judge *a quo*, prohibiting him from proceeding to allow the order of seizure, until the party is heard on his appeal..... *ib.*

5. Such as the injunction originally was before the judgment of non-suit, so it remains until the appeal is tried; and no proceedings can be had until it is finally decided in the Supreme Court..... *ib.*

6. Interest on the dissolution of injunctions cannot exceed ten per cent.; if the judgment enjoined bears ten per cent. interest; all above that sum which is allowed must be in the way of damages if the injunction is dissolved.
R. McCarty vs. *J. P. McCarty.* 300

7. Where a judgment, which is enjoined already, bears interest at ten per cent. per annum, no further interest can be allowed on a dissolution of the injunction.....*Smith* vs. *Brownson.* 313

8. Interest on the dissolution of the injunction may be increased to ten per cent.; but whatever else, that may be allowed against the plaintiff and his surety in injunction, should be given as damages..... *ib.*

PAGE

9. On the dissolution of injunctions under the statute of 1831, this court has sometimes allowed as damages, the expenses for professional services, which the creditor enjoined has incurred in setting the injunction aside, when improperly obtained.....*Melançon's Heirs* vs. *Robichaud's Heirs.* 357

10. The defendant in injunction enjoining his order of seizure and sale, changes the proceedings from the *via executiva* to the *via ordinaria*, when he prays for judgment against the debtor. In cases of this kind no damages should be allowed, and judgment must be given as in an ordinary suit.
McMillen vs. *McKerroll et al.* 372

11. The courts will not assess damages on a plea in re-convention, in a suit by injunction or sequestration. The party must take his remedy on the bonds given by the plaintiff in injunction.....*Patin* vs. *Blaize, jr.* 396

12. Damages for the wrongful suing out an injunction may be claimed in the same suit, under the provisions of the act of 1831, in cases embraced by this act; but from its wording it seems to apply particularly where judgments are enjoined..... *ib.*

13. When it appears in the progress of the trial, that a payment is made of part of the debt; although the injunction may have to be dissolved for want of an allegation of payment, yet a new one for the amount should be granted and perpetuated..... .....*Woodburn* vs. *Friend et al.* 496

14. Where the party is entitled to a new injunction *instanter* for a part of the debt, on the dissolution of the first, he will not be mulct in damages..... *ib.*

INSOLVENCY.

1. An insolvent debtor may make valid sales of his property at any time before actual insolvency, when no preference is given to any creditor over others.
Crocker, Syndic, &c. vs. *Champlin.* 12

2. The oath of an opposing creditor is not necessary to his opposition made to the appointment of a syndic.....*Girard et al.* vs. *Their Creditors.* 246

3. The syndic cannot claim the reversal of a judgment, which reduces his claims on his tableau, and when he and none of the creditors, whom he represents, are aggrieved.....*Ferguson & Hall et al.* vs. *Their Creditors.* 278

4. So where a creditor's claim is reduced from a privileged to an *ordinary one*, and he does not appeal, the syndic representing the *mass* of creditors, who are benefited, cannot appeal or have the judgment altered..... *ib.*

5. A privileged claim of the vendor will not be allowed on the goods of the insolvent, mingled with an old stock, and when they are not identified..... *ib.*

6. Where it is not shown or does not appear, that the insolvent was a merchant or trader, or ever kept any books, he will not be denied the benefit of the insolvent laws, for not depositing any books in court.....*Wilson* vs. *His Creditors.* 33

7. When the evidence of the debt and writ of arrest are produced, it is sufficient to show, the debtor is in actual custody; to entitle him to the benefit of the law for the relief of debtors in actual custody..... *ib.*

8. Where the debtor makes a cession of his property, which has been sequestered, it should be delivered up to the syndic to be sold; the privilege or

PAGE
claim of the suing creditor being preserved on the proceeds; and the sequestration is consequently cancelled.....*Duclerc* vs. *Crebassol et al.* 91

9. It is necessary to allege and show, that an absconding insolvent debtor was a merchant or trader under the act of 1826, to sustain an action for a forced surrender. The allegation must be made in the pleadings, in order to let in evidence in proof of it.....*Shakespeare et al.* vs. *Saunders.* 97

10. A sale by the father to his son not a creditor, of his estate for a sound price, where there is no privity between the latter and the creditors of his father, and none between the father and the creditors, *is valid*, although the father was insolvent at the time, and the son agreed and did apply the *price* to the payment of a portion of the creditors. Nor is the mere relationship of the father and son evidence of fraud.....*Maurin* & *Co.* vs. *Rouquer et al.* 594

INSURANCE.

1. Where the insured sells the property covered by the policy, and afterwards takes it back on account of the non-payment of the price, and is in possession at the happening of the loss, she will recover, although a clause in the policy provides, it shall be void in case of transfer or assignment, without the consent of the insurers.....*Power, tutrix, &c.* vs. *Ocean Insurance Company.* 28

2. By the implied resolutory clause in her sale, the plaintiff was restored to the possession and ownership of her property before the loss, as if no transfer had taken place..... *ib.*

3. It is sufficient if the insured has an interest in the property, at the time of insuring, and at the happening of the loss..... *ib.*

4. The bill of lading is sufficient evidence of ownership to entitle the shipper to recover the insurance, even against the testimony of witnesses to the contrary. *Page* vs. *Western Marine* & *Fire Insurance Co.* 49

5. A fair and *bona fide* sale of damaged property, under circumstances, that render its shipment to the port of destination impossible, except in a very damaged condition, is the best that can be done for all concerned, and the underwriters cannot complain..... *ib.*

6. The master of a boat or vessel, whose cargo is damaged by the perils insured against, so as to render its re-shipment inexpedient and unprofitable, has authority to sell it for the best price at the place, and for the benefit of all concerned.....*Vaughan* vs. *Western Marine* & *Fire Insurance Co.* 54

7. The effect of a valid abandonment of the object or property insured, is to transfer it to the underwriters, who take the place of the insured. *Hooper et al.* vs. *Whitney.* 267

8. The underwriters are subrogated to the rights of the insured by the abandonment, which also goes to include the *spes recuperandi*..... *ib.*

9. So a sale of a vessel at the port of necessity by the master under necessitous circumstances, vests the purchaser with a good title. The insured, after abandonment, cannot set up any claim or maintain an action against the purchaser to recover her..... *ib.*

10. Memorandum articles are liable to no constructive or total loss, so long as they continue of *any value*; although they are so damaged as to be rendered

PAGE

absolutely of no value, still if they remain *in specie*, or can be designated by the same name, the underwriters are not liable for a total loss.

Skinner & *Kennedy* vs. *Western Marine* & *Fire Insurance Co.* 273

11. So where a boat loaded with pork in bulk, some flour and beans, was partly consumed by fire, but the bottom floated on to the port of destination, with about 11 per cent. of the cargo of pork; it being much roasted and barbacued, but was still recognized as pork: *Held*, that the insurers were not liable for a total loss... *ib.*

12. The fact of the property of the insured, being purchased by his son at a sale made by the master of the damaged cargo, is not sufficient to prove that the purchase was made on account of his father, or in any manner to affect the validity of the sale..... *Vaughan* vs. *Western Marine* & *Fire Insurance Co.* 276

13. A competent crew is necessary to the sea worthiness of a boat or ship; but if one is provided, the occasional absence from the vessel of a hand or seaman, on the business of the voyage, does not defeat the policy; especially when his presence could not have prevented the accident.

Caldwell et al. vs. *Western Marine* & *Fire Insurance Co.* 42

14. A strong case of necessity is required to justify a master in selling his boat or vessel and cargo, if other means of saving either be within his reach. But where he acts with fairness, and uses all proper diligence to save both, he will be justified by the necessity of the case, in selling both the boat and cargo..... *ib.*

15. The master of a boat, whose cargo is materially damaged by one of the perils insured against, is not bound to wait a great length of time, at a heavy expense, to overhaul, repack and reship the cargo, when but little or nothing would be saved. He may exercise a sound discretion and sell it in its damaged state for the best price and benefit of all concerned.

Robertson et al. vs. *Western Marine* & *Fire Insurance Co.* 227

16. The purchase of property damaged by the perils insured against, by the owner, who has been insured, is illegal and has the effect of revoking his abandonment, and turning the total into a partial loss, which is all that can be recovered. *ib.*

17. After abandonment the insured becomes the agent of the underwriters, and standing in that relation, he cannot purchase, except with the consent of his principals. The master and owner both become agents of the insurers, on abandonment..... *ib.*

18. Custom or usage in the country, of owners buying in their property, when sold as damaged for account of the underwriters, cannot justify *that* which by the law of insurance has been held to be unlawful..... *ib.*

INTEREST.

1. Where notes, given for the price of property producing fruits and revenues, are by agreement or otherwise to remain deposited and payment suspended until defects in the title are cured; on their restoration, payment of the interest arising *ex-morâ* will be decreed, as a compensation for the fruits of the thing sold, when it remained in the enjoyment of the vendee.

Ball et al. vs. *Le Breton et al.* 147

2. The purchaser who wishes to relieve himself from the payment of interest, must avail himself of the faculty given him to *deposit the price* due by him... *ib.*

PAGE

3. Legal interest from judicial demand on liquidated claims will be allowed, when the party was first in delay.....*Brownson* vs. *Fenwick*. 431

INTERVENTION.

1. Intervenors have no right to come in and contest the jurisdiction of the court in which the plaintiff had a right to sue. They must take the case as they find it; and if their interests are effected, it is the result of their own acts.

Kenner & *Co.'s Syndic* vs. *Holliday et al.* 154

JUDGMENTS.

1. Judgment affirmed with the maximum of damages for a frivolous appeal.

Kolligs' brothers vs. *Meeks*. 75

2. A judgment which has become definitive, cannot be set aside by consent of *parties*, especially when all the parties interested are not present; nor can an attorney deprive his client of the benefit of his judgment without a special power to do so.....*Morgan*, *Dorsey* & *Co.* vs. *Their Creditors*. 84

3. A judgment homologating a tableau of distribution is one in favor of each creditor to whom a dividend is assigned; and has the effect of *res judicata* in relation to the proceeds or money in the hands of the syndic..... *ib.*

4. Judgment affirmed; the record being imperfect, so as to preclude an examination of the case on the merits.....*Beach* & *Co.* vs. *Wagner et al.* 86

5. A judgment obtained in the last resort is final and conclusive between the parties to it; although it may not be so as to third persons: nor can a change by the common debtor making a surrender, affect the rights of the judgment creditors, who have a privilege or mortgage on the property ceded.

Skipwith vs. *His Creditors*. 198

6. In a petitory action when the defendant exhibits the best title, he will be entitled to *final judgment in his favor*, and not merely one of non-suit.

Guidry vs. *Woods*. 334

7. A judgment which states that it was rendered by *consent* of parties; especially when it does not appear the defendant ever was cited or made a party to the suit, *is illegal*.....*Broussard* vs. *Broussard*. 354

8. The case depends entirely on facts and calculations made by Auditors and the inferior court, which are approved and judgment affirmed.

Parry vs. *Hannon*. 393

JURISDICTION.

1. A married woman may sue her tutor, in the Court of Probates, for the balance due her; and maintain the action with the assistance of her husband, on a note given in his name, as her agent, for a part of the sum coming to her.

Thibodeaux vs. *Thibodeaux*. 439

2. This court will take jurisdiction of a suit for separation from bed and board, although the matter in contestation is not *appreciable in money*, or does not consist in a money demand exceeding 300 dollars.....*Rowley* vs. *Rowley*. 557

3. The law expressly gives the courts jurisdiction in cases of separation

PAGE
from bed and board, and in actions of divorce; and this court will not hesitate to act under it, when they have not the slightest doubt of the constitutionality of the law..... 557

JURY.

1. When an important fact which is submitted to a jury, is not positively proved, but only *inferred* from the evidence, their verdict is entitled to great weight, and will not be set aside unless manifestly erroneous.
Vaughan vs. *Western Marine and Fire Insurance Co.* 54

2. The verdict of a jury in a case depending only on facts will not be disturbed, when not manifestly erroneous.....*Nott & Co.* vs. *Kirkman et al.* 14

LANDS AND LAND LAWS.

1. Admitting the plaintiffs are owners of the upper end of a larger tract of land, yet if they show no location by an authorized survey embracing the *locus in quo*, they cannot maintain an action even of trespass against a possessor so as to oust or disturb him.....*Hornsby's Heirs* vs. *M'Dermott.* 304

2. The certificate of purchase from the register and receiver is not final evidence of title out of government, when it is shown the entry and purchase was improperly allowed; although generally such certificates are considered as sufficient evidence of a sale from the government as to form the basis of a petitory action.....*Guidry* vs. *Woods.* 334

3. The register and receiver are to decide on the fact whether the applicant for a pre-emption is in possession and has cultivated the land within the previous year; but if they undertake to grant a pre-emption to land, which the law declares shall not be granted, they are acting on a subject matter clearly not within their jurisdiction..... *ib.*

4. The commissioner of the General Land Office under the supervision of the secretary of the treasury, has the power to declare what lands, according to law, are liable to entry or location by pre-emption rights or floats; and may cancel the certificate of the register and receiver in this respect..... *ib.*

5. The evidence and deposition of the land commissioner, of cancelling the register and receiver's certificate of land, not liable by law to be sold or entered as pre-emption rights or floats, is admissible in proof of these facts..... ... *ib.*

6. Fractional townships fronting on water courses are surveyed in small tracts or lots of about 160 acres each, and numbered, but the lot or fractional section numbered 16, is not designated by law as school lands. It is only under the general laws, and where the township is surveyed in square sections that every 16th section is reserved as school land.....*Barton's Executrix* vs. *Hempkin.* 510

7. In fractional or irregular townships on water courses the secretary of the treasury is required by law to select and designate the school lands..... *ib.*

8. The chief clerk in the general land office, being designated by law to act as commissioner in case of vacancy, &c., he is therefore an officer known to the law, to be recognized as such and presumed to be acting in accordance with law..... *ib.*

PAGE

9. Registers and receivers are to decide on the facts and sufficiency of proof in cases of pre-emption when no fraud exists; but if they sell land exempted from sale by law, their acts are void for want of authority.
Barton's Executrix vs. *Hempkin.* 510

10. The commissioner of the General Land Office may at least suspend if not annul titles granted by the register and receiver, until Congress or the courts can act. ..... *ib.*

11. The mere statement of the commissioner of the General Land Office that he has cancelled a certificate of purchase given by the register, &c., is not an eviction which should rescind a sale between third parties. ..... *ib.*

12. It is essential to the validity of an entry that the land intended to be appropriated, should be so described as to give notice of the appropriation to subsequent locators. ..... *Patin* vs. *Blaize, Jr.* 396

LAWS.

1. Remedial statutes or laws have no extra-territorial effect or operation.
Briggs, Lacoste & Co. vs. *Campbell.* 524

2. The interpretation of contracts depends upon the foreign law; but the remedies by which the obligation resulting from contracts are sought to be enforced, must be according to the forms and law of the place where the remedy is sought. ..... *ib.*

3. The last article (3521,) of the La. Code, which repeals all laws in every *case* provided for in the Code, itself, applies not in every particular instance or cause, but to every *category* or *class of cases*, or *subject matter* upon which the Code contains express provisions, and abrogates all previous laws on these subjects. ..... *Waters* vs. *Petrov e & Elanchard.* 584

4. This court has held (in 5 La. Rep. 493,) that part of the act of 1808, relative to proceedings upon prison bonds was still in force, notwithstanding the repealing act of 1828, and the Code of Practice. ..... *ib.*

LEASE.

1. Interest cannot be recovered for rent arrear, from the time it became payable; but only from judicial demand. ..... *Perret et ux.* vs. *Dupré et al.* 341

2. So a party is not bound to repair the leased premises when it can only be done by erecting new buildings. The adverse party may annul or put an end to the lease. ..... *ib.*

MINOR.

1. The father or mother of a minor, or person in whose charge the minor is left are responsible for the injury he may do to another; but this responsibility is based on the ground that the person having control of him could have prevented the act and did not; and is responsible for neglect.
Cleaveland vs. *Mayo et ux.* 414

2. But where a person, having control of a minor, causes or commands him to commit a crime, or an act causing damage and injury to another, such

PAGE
person is responsible as having committed the offence, although an irresponsible person has been interposed..... *Cleaveland* vs. *Mayo et ux.* 414

3. Where a person has treated with a *minor*, he cannot plead the nullity of the agreement, when sought to be enforced after the disability has ceased.
Anderson's Administsator vs. *Birdsall's Administratrix.* 441

MORTGAGE AND PRIVILEGE.

1. A third purchaser of an estate, subject to certain mortgages, which she assumes to pay, cannot set up her own claims in opposition to the mortgage creditor on said estate..... *Kenner & Co's Syndic* vs. *Holliday et al.* 154

2. Where notes are given in renewal of those sued on, although such renewal may not operate a novation, so as to affect the mortgage by which ultimate payment is secured, no recovery can be had until the new notes are produced..... *Plicque & Le Beau* vs. *Perret, &c.* 318

3. The value of the hire and use of slaves, mortgaged and put in possession of the mortgagee, to indemnify him against an endorsement, will be allowed in compensation of the amount actually paid by him as endorser.
Hutchings' Widow and Heirs vs. *Johnson's Heirs.* 437

4. A mortgage executed by the maker of a note, to secure the endorsers, becomes null when there are no steps taken to fix their liability; and the transfer to the holder of the note after the endorsers are discharged for want of protest and notice, confers no rights on the transferee..... *Peets* vs. *Wilson.* 478

5. The fact of an endorser taking a mortgage from the maker of a note to indemnify him against loss, does not dispense with demand protest and notice. *ib.*

NEW TRIAL.

1. A new trial should not be granted, to enable the party to prove the tender of a slave in a redhibitory action, on the ground of an oversight in his counsel to prove it on the trial, when it does not appear, any diligence was used to procure proof..... *Houghteling* vs. *Fisher.* 475

2. The discretion of the Supreme Court, to remand causes for a new trial, will be exercised only in extreme cases, when the party has shown due diligence and is guilty of no *laches*..... *ib.*

NOVATION.

1. Where notes are given in renewal of those sued on, although such renewal as between the parties may not operate a novation, so as to affect the mortgage by which ultimate payment is secured, yet the plaintiff cannot recover without producing or satisfactorily accounting for the notes given in renewal.
Plicque & Lebeau vs. *Perret, &c.* 318

OBLIGATIONS.

1. Where persons representing a succession executed their notes to the cre-

PAGE
ditor for the original debt due by it and secured by mortgage, their obligation is in the nature of the *pactum constitutæ pecuniæ*, engaging their *personal liability*, that the debt should be paid within a certain time, or the creditor be at liberty to seek payment according to his original right on his mortgage.
McDonogh vs. *Relf* & *Zacharie*, &c. 100

2. If the new obligation be for more than was legally or actually due on the original one, the mistake being discovered, the *pact* or *new obligation* is void *pro tanto* for want of a debt which was the foundation of it..... *ib.*

3. The recognition of a debt is always to be understood with reference to a *primordial title*; and if the party is obliged further, or otherwise than as the primary title imports, on showing the error he will be relieved..... *ib.*

4. So where R. & Z. being heirs of a succession and administering it as executors, gave their notes to the creditor by the original debt and mortgage, who reserved the right to go upon the mortgage if the notes were not punctually paid, and did so after the payment of the first note; and in which, the debt was ascertained by a judgment to be *much less* than the amount for which the new obligation was given: *Held*, that there was error for this amount, and the new obligation can have no effect..... *ib.*

5. BULLARD J. & MARTIN J. *dissenting*. The failure to give notice of the extinguishment of a mortgage, did not forfeit accruing interest; it only authorized a *suspension* of payment. Interest still runs in such a case, although not exigible..... *ib.*

6. If it be of the essence of the *pactum constitutæ pecuniæ* that there should be a pre-existing debt, it is only to distinguish it from a donation; but it suffices if the debt, the payment of which is promised, should be due in *foro conscientiæ*; and that there should exist a just subject for payment, although it may be in *foro legis* declared null..... *ib.*

PARTNERSHIP.

1. Where a party has made himself liable to creditors by dealing with the firm, although not a partner, and has been compelled to pay a partnership debt to a creditor, he will recover it back from the firm.....*Flower* vs. *Millaudon*. 185

2. All the partners in a commercial firm must join in an action or obligation due to the partnership; and on the dissolution of the partnership by the death of one of the partners, the surviving ones must join the representatives of the deceased, or obtain authority from the proper tribunal, before they can sue for a partnership debt.....*Hyde et al.* vs. *Brashear*. 402

3. The incapacity of surviving partners to sue without obtaining authority or joining the representatives of the deceased, need not be specially denied. It may be assigned for error..... *ib.*

4. The representatives of the deceased partner must be joined, or authority from the Court of Probates obtained, in a suit by the surviving partners, due the partnership.....*Babcock, Gardiner & Co.* vs. *Brashear*. 404

PAYMENT.

1. Compensation and payment must be specially pleaded to enable the de-

PAGE
fendant to make proof of either.....*McKown* vs. *Mathes.* 542
2. But an amendment setting up the plea of payment and compensation, comes too late after the trial commences and the jury are sworn..... *ib.*
3. A receipt of full payment by the original *payee* to the maker of a note, offered against the holder, will be disregarded when shown to be collusive, and when it is contradicted by other evidence.....*Bienvenu* vs. *Segura.* 346
4. Where the creditor does not suspend his execution so as to put it out of his power, or the surety (if he pays,) to pursue the debtor, it is no prolongation of the time of payment.....*Woodburn* vs. *Friend et al.* 496

POSSESSORY ACTION.

1. In a possessory action the civil possession of the plaintiff, preceded by an actual and corporal detention of the thing, will suffice, as it allows him the benefit of the previous corporal possession of his author.....*Ellis* vs. *Prevost et al.* 251
2. The court do not recognize the doctrine, that there is but one kind of possession; and that civil possession will suffice in all cases in possessory actions.... *ib.*
3. Possession is acquired by the actual and corporal detention of the property; this is natural possession or possession in fact; and it is preserved and maintained by the mere will or intention to possess, and this is civil possession or possession in right..... *ib.*
4. So where a person is disturbed in his possession, he has the right, within a year and by virtue of his civil possession, founded on his previous corporal and actual possession to institute the possessory action, to recover it..... *ib.*
5. The person claiming by possession alone, without showing any title, must prove an adverse possession by inclosures, and his possession cannot extend beyond.....*Ellis* vs. *Prevost et al.* 521
6. Where a citizen peaceably takes possession of a portion of public land or domain, to which no private claim is set up, and improves it, none but the government can disturb him in the possession of what he has actually inclosed. *Miller* vs. *Lelen.* 531
7. Where the vendor and vendee live in the same house, *possession* follows title.....*Kemper's Heirs* vs. *Hulick.* 349
8. So where the son was possessed of a slave, who was assessed in his name, and lived in the common dwelling with his father at his death, and his widow took the slave with her when she removed: *Held*, that she was the legal possessor..... *ib.*
9. The plaintiff is not bound to show a perfect title to recover against a trespasser without title, provided he has actual possession. When a civil possession is relied on alone, the title must be *prima facie*, such as would be translative of property.....*Patin* vs. *Blaize, Jr.* 396
10. Title papers are admissible in evidence in a possessory action, to show the extent and limits of the plaintiff's possession; although no inquiry can be had as to the validity of titles in this action.....*Lecomte* vs. *Smart.* 484
11. Where a person takes possession of land under an apparent title as his own, slight acts will be received as evidence of an intention to take actual possession..... *ib.*

PAGE

12. But where a man without any pretence of title, goes upon land claimed by another, he must show unequivocal acts of possession, more *than a year*, to maintain the plea of prescription. 484

PRACTICE.

1. Signatures to the notes and checks sued on, are admitted by the plea of the general issue. ..... *Beach & Co.* vs. *Wagner et al.* 86

2. If the pleadings state the non-residence of the plaintiffs, their absence and right of their attorney to make affidavit for them, will be presumed, when the contrary is not alleged or shown. ..... *Austin et al.* vs. *Latham.* 88

3. It is entirely a discretionary power in the inferior courts, to order a case to be sent before auditors, to facilitate the trial of causes by the investigation of accounts. ..... *Guinault* vs. *Le Carpentier.* 239

4. Where the verdict of a jury appears manifestly erroneous, the cause will be remanded for a new trial. ..... *ib.*

5. When the judgment of the court is confined to the points filed or raised in the argument of the case, it will not listen to an application for a re-hearing on other grounds, suggested after the cause has been decided.

Caldwell et al. vs. *Western Marine & Fire Insurance Co.* 48

6. Where the plaintiff failed to make out her case by full proof, the court on consideration, set aside the non-suit and remanded the cause for a new trial. ..... *Barton's Executrix* vs. *Hempkin.* 517

7. In a petitory action, when the defendant exhibits the best title, he will be entitled to final judgment in his favor, and not merely one of non-suit.

Guidry vs. *Woods.* 335

8. It is not enough that a party renders his rights and claim probable in a court of justice; he must make them legally certain. ..... *Skipwith* vs. *His Creditors.* 198

9. When all the promises and contracts are set out in the pleadings, if any one of them will authorize judgment, the court should render it. Irrelevant or useless matter does not vitiate the good. ..... *Rowle etc.* vs. *Skipwith et ux.* 207

10. The party having the legal title may sue for the benefit of whom he pleases; in the same manner as he might dispose of the funds after judgment, if he sued in his own name. ..... *ib.*

11. Where a case is dismissed on an exception in *limine litis*, the Supreme Court cannot examine it on its merits. It must be remanded for a *new trial*. ..... *ib.*

12. Where the plaintiff makes that hardly probable, which he was bound to make certain, and where there is a verdict against him, he is not entitled to be relieved; but if the verdict is against the defendant, in such a case a new trial ought to be granted. ..... *Barrett* vs. *Bullard.* 281

13. Where the evidence does not support the charges in a physician's bill, the court will give such judgment as may appear reasonable and equitable from the proof and circumstances of the case. ..... *Lefebre* vs. *Lastrapes.* 353

14. A slight variation in setting out the name of a corporation will not affect the right to maintain the action. ..... *Canal Bank* vs. *Fisher.* 365

15. Persons responsible for a trespass or injury in different capacities need

PAGE

not be joined in the same action, although if liable in the same way, all must be joined as in a joint action. ..... *Cleaveland* vs. *Mayo et ux.* 414

16. Where the quantum of damages is not proved or is left doubtful, the case will be remanded to ascertain them. ..... *Riggs* vs. *Duperrier et al.* 418

17. After a judgment by default, and answer to the merits, an exception denying the defendant's capacity to be sued as administratrix, is not admissible. *Cleevers* vs. *Burke's Administratrix.* 429

18. Where a case comes up on a judgment of non-suit in which there was no trial on the merits, or bill of exception taken, this court cannot go into the merits. ..... *ib.*

19. When a demand is afterwards set up for services growing out of a transaction already settled between the parties, for which no charge was made, and it is not shown the settlement was erroneous, it will be presumed the services were gratuitous. ..... *Brownson* vs. *Fenwick.* 431

PRESCRIPTION.

1. Evidence which is inadmissible to prove title may be received to show possession by known marks and boundaries, which is good to sustain the plea of prescription. ..... *Broadway's Heirs* vs. *Pool.* 258

2. The plea of prescription may be filed or amended on the trial, after the plaintiff has closed his evidence. It is a plea favored in law, and may emphatically be filed at any time. ..... *ib.*

3. The possessor of slaves under a just title, in good faith, will be protected by the prescription of five years. ..... *Blanchard* vs. *Castille.* 362

4. The plea of prescription of one year is not applicable to a workman's account, for work done by the job, and materials furnished, whether it be under a specific agreement or on a *quantum meruit.* ..... *Ariail* vs. *Fenwick.* 413

5. The action on a curator's bond against the sureties is not prescribed by the lapse of one year. It is an action arising *ex contractu.* *Brown* vs. *Gunning's Curatrix et al.* 462

6. Actions to annul a sale, brought by a complaining creditor, for giving an undue preference to a portion of the creditors of the common debtor, are prescribed by the lapse of one year from the date of the sale. *Maurin & Co.* vs. *Rouquer et al.* 594

PRINCIPAL AND AGENT.

1. If a person acts merely as agent of his brother-in-law, at the sale of his own property, and in superintending it afterwards, he will not be considered as interested, or his acts viewed as an interference with the property, or an exercise of ownership over it. *Vaughan* vs. *Western Marine & Fire Insurance Company.* 54

2. Where the agreement leaves it doubtful whether the agent was entitled to commissions on certain notes received in payment, or only on *monies* received, and the jury find a verdict in the affirmative it will not be disturbed. *Vignie* vs. *Saulet.* 23

3. So where it appeared the defendant gave orders to the intervenors to ship his cotton in their names, it was held that the legal possession and control over

PAGE

it remained in him, as owner, through the interposition of these persons, *as his agents*.....*Hamer* & *Co.* vs. *Lawrence et al.* 58

4. An agent to purchase slaves cannot buy from himself, or put one of his own slaves in, so as to charge the principal with his price, or value; and where there was deception inducing him to settle with the agent he will recover back, as having been allowed in error.....*Brownson* vs. *Fenwick.* 431

PRINCIPAL AND SURETY.

1. The surety who has paid defendant's notes in the hands of a third person without notice of the defence set up, will recover the amount he has paid notwithstanding the eviction and loss of title to the property for which the notes were given.....*Gasquet* vs. *Oakey.* 76

2. The surety in an attachment bond need not be owner of real estate or a freeholder; so that he is solvent and resides within the jurisdiction of the court, it is sufficient.....*Austin et al.* vs. *Latham.* 88

3. In an action on a joint obligation when it is shown, two of the parties signed as sureties of the third, any payments made by the principal debtor will be imputed and go to the extinguishment of the debt, and judgment given for the balance, against the principal and sureties *in solido.*

Brander et al. vs. *Garrett et al.* 453

4. In a suit on *a joint note*, where it is shown the defendant signed as surety for the other maker; although the obligation be *joint only in its form*, yet the surety is bound for the whole debt, or liable *in solido.*

Roberts & *Crain* vs. *Jenkins.* 453

5. The obligation entered into by the principal and his surety, is not a joint one; but on the contrary, each one is bound towards the creditor for the whole, although as between themselves, the entire debt or sum is due by the principal, and can be recovered of him by the surety who pays.

Bonny & *Baker* vs. *Brashear.* 383

6. A surety may be sued without his principal.....*ib.*

7. Where the curator fails to comply with his duties, and pay over money, any creditor of the estate may at once resort to his action on the curator's bond against the surety.....*ib.*

8. The surety cannot appeal from a judgment against him and his principal, which the latter has already had reversed on appeal. The release of the principal in the judgment, released the surety, although not a party to that appeal.

Brashear vs. *Carlin, Curator, &c.* 395

9. The obligation of the surety in a curator's bond is that the principal will administer the estate according to law; and his duty requires him to pay all the creditors equally according to their rank.

Brown vs. *Gunning's Curatrix et al.* 462

10. Judicial sureties are bound *in solido;* so each surety in a curator's bond is liable to the action of the creditors of the estate, for the whole amount claimed. *ib.*

11. Sureties in bonds taken in judicial proceedings are bound *in solido;* being entitled to neither division nor discussion; so several sureties in a twelve months bond are each bound for the whole sum. *Woodburn* vs. *Friend et al.* 496

PAGE

PROHIBITION.

1. A prohibition is not a writ of right, but the court may grant it on such conditions as will secure to the party who may suffer by it, sufficient indemnity for the trouble, delay and losses he may unjustly sustain.

State of La. vs. *Judge of the First District.* 167

2. An oath is not required to a petition for a writ of prohibition, if the truth of the facts stated in it appear from an inspection of the record and proceedings had in the case. ..... *State of La.* vs. *Judge of the First District* 174

3. Where, by an error of the Judge *a quo* in refusing to allow a *suspensive* appeal, by authorizing an execution to issue, after being divested of jurisdiction, a writ of prohibition is the proper remedy to correct such error. ..... *ib.*

4. A writ of prohibition may issue to suspend the action of an inferior tribunal for a time, and until it legally resumes the exercise of its former jurisdiction. ..... *ib.*

5. The Judge of an inferior court cannot grant an order of seizure and sale after an appeal is taken from *his refusal* to issue the same order, previously applied for. But if *he does*, the proper remedy to arrest his proceedings is by writ of prohibition. ..... *ib.*

6. The authority to grant writs of prohibition is considered in relation to the constitution, which allows to this court appellate jurisdiction only, and is to be confined to matters which have a tendency to *aid that jurisdiction*. ..... *ib.*

PUBLIC PLACES.

1. Ancient plans of a city are admissible in evidence to prove the boundaries of lots sold in reference thereto, and the direction of streets so far as they may extend, although not including the *locus in quo;* and especially when one of the parties claim under those who caused the plans to be made.

Carrollton Rail Road Co. vs. *Municipality No. 2.* 62

2. Where a canal and basin figure on the original plan of a city, but are always used and sold by the proprietors, they will be considered as private property. ..... *ib.*

3. In order to dedicate property to public *use* there must be a plain and positive intention to give and one equally plain to accept. The form is not material. *ib.*

REDHIBITION.

1. In a redhibitory action for the rescission of the sale of a slave, a tender or offer to return the slave must be proved at the trial, to have been made before suit. ..... *Barrett* vs. *Bullard.* 281

2. Actual idiocy might, perhaps, be deemed a redhibitory vice in a slave; although not specially named in the code; but such defect would be apparent to an ordinary observer as to bring the case within the article 2497 of the La. Code. ..... *Briant* vs. *Marsh.* 391

3. Where the evidence establishes the existence of a redhibitory disease at the time of sale, although not perceptible to ordinary observers, or known to the vendors; yet it is sufficient to authorize a rescission of the sale and return of the price. ..... *Riggs* vs. *Duperrier et al.* 418

PAGE

RES JUDICATA.

1. In judgments of the Supreme Court, the reasoning is less to be regarded, than the final conclusion announced; so when the decree is positive, without any reservation, it is *res judicata* as to all the matters in dispute.

Plicque & *LeBeau* vs. *Perrett etc.* 318

2. No matter in what form of action or proceeding, whether by petition, exception or intervention the question may have been presented, if the same question once judicially decided between the parties be again agitated, it is sufficient to create the presumption resulting from the *thing adjudged*, and forms a complete bar..... *ib.*

SALE.

1. The adjudication is the completion of a sale, so as to invest the purchaser *as owner*, and with the right of possession of the thing sold.

Municipality No. 1 vs. *Cordeviolle* & *Lacroix.* 235

2. So the adjudication entitles the vendor not only to damages for non-compliance, but to an action for the price..... *ib.*

3. The sale is perfect between the parties, and the property is acquired to the purchaser on an agreement between them, as to the object sold and the price, even without delivery..... *ib.*

4. The purchaser may retain the price, when he is in danger of eviction from a previous claim on the property, except where he has been informed of it, before the sale. A claim resulting from an act of the legislature, comes within the exception, as ignorance of it cannot be pleaded..... *ib.*

5. A claim of the Draining Company on land for its improvement, is not adverse or a disturbance of possession..... *ib.*

6. Purchasers cannot complain of the failure of the vendor to pass an act of sale, when it was caused by their own acts, in directing the notary not to give up their notes..... *ib.*

7. When the evidence shows, that the sale from the defendant to the intervenors was only to give the latter a colorable claim to the property (or cotton), the sale was held to be made for the purpose of protecting it from the pursuit of creditors, and void.....*Hamer* & *Co.* vs. *Lawrence et al.* 58

8. In the sale of property subject to an annual tax, the purchaser takes it subject to all the tax *accruing* after the sale; the vendor being liable for all due up to the time of sale.....*Gourjon, f. m. c.* vs. *Holmes et al.* 232

9. Where the seizure is made and notice given on the 21st June, and the advertisement is dated the 24th of the same month, it will be considered as one day too early. Three days should intervene between the notice of seizure and the advertisement.....*R. McCarty* vs. *J. P. McCarty.* 300

10. The sale of real property cannot be legally made by the sheriff until the 34th day after seizure. But if this time is given, it cannot be objected that the advertisement was posted up a day or two sooner than was required..... *ib.*

11. A clerical error in the description of a piece of land in the sheriff's advertisement of the sale, not calculated to mislead the party interested, is immaterial. *ib.*

12. Where a party shows a judgment, execution, sheriff's return thereon,

PAGE

and deed of sale, it is *prima facia* evidence of a valid alienation; and the party attacking the sale must show the forms of law have not been complied with. *Walker* vs. *Allen et al.* 307

13. If a purchaser at sheriff's sale does not offer good security, the sheriff must sell again immediately. If he gives any delay, it is at his own risk and he will be liable in damages to the plaintiff in execution, if any are sustained in consequence of such delay. ..... *ib.*

14. The vendee in a conditional sale or *vente à réméré*, has a greater analogy to a usufructuary than to any other bailee of the property of another, as regards the fruits or increase..... ..... *Patterson* vs. *Bonner.* 508

15. Neither the usufructuary or vendee in a sale *à réméré*, can make the children or young of slaves, born during their possession, *their own*..... *ib.*

16. Where there are ambiguities in the boundaries and corners of a tract of land in controversy, between the defendant and plaintiffs, as vendor and vendees, occasioned by leaving blanks in the notarial act of sale, a private act previously executed between the same parties, will be received in evidence to explain and show the true boundaries and corners, when it is not inconsistent with the notarial act..... *Labauve et al.* vs. *Declouet.* 376

17. Where a tract of land is sold as "4 *arpents front with about* 35 *or* 40 *in depth;*" the front to begin at a certain point, and the tract is *bounded on both sides* by plantations, it is a sale *per aversionem;* and the boundaries will control the enumeration of quantity..... *Prejean* vs. *Giroir et al.* 422

18. A sale by the father to his son, not a creditor, *of his estate*, at a sound price, where there is no privity between the latter and the creditors of his father and none between the father and his creditors, *is valid*, although the father, was insolvent at the time, and the son agreed and did apply the *price* to the payment of *a portion* of the creditors: Nor is the mere relationship of the father and son, evidence of fraud..... *Maurin* & *Co.* vs. *Rouquer et al.* 594

19. The sale would be good as to the son, even if it was the intention of the father to defraud his creditors, because the contract of sale was onerous and the purchase made for the full value of the property..... *ib.*

SEPARATION FROM BED AND BOARD.

1. Living unhappily together; having frequent differences, ebullitions and displays of temper, but without any personal or other violence; the want of supplies or necessaries according to the wife's demands; the non-payment of her bills promptly, and for the education of her daughter; the want of support according to her rank and fortune she brought into marriage, and supposed impossibility of the parties ever living together again, are not sufficient *causes of separation from bed and board*..... *Rowley* vs. *Rowley.* 557

2. During the pendency of a suit of the wife for a separation from bed and board, the wife may leave the home assigned her as a residence, on business, and be temporarily absent..... *ib.*

3. A judgment for alimony may be given, even when no separation from bed and board follows..... *ib.*

4. The court may, in its discretion, change the residence of the wife during the pendency of her suit for separation..... *ib.*

PAGE

SERVITUDE.

1. The lower one of two adjacent estates, owes a servitude to the upper one, of allowing the waters to pass off from the latter through the natural drains over the land of the former.....*Hays* vs. *Hays.* 351

2. If the proprietor of the lower estate obstructs the natural flow of the waters of the upper estate he will be compelled to remove such obstructions at his cost. *ib.*

SLAVES.

1. A slave held by a deed of trust or mortgage, which is not recorded in this State, to which the slave has been removed, is liable to seizure by a creditor of the original owner.....*Zollikoffer* vs. *Briggs, Lacoste & Co.* 521

2. Slaves held under a sale with the equity of redemption existing, are not liable to the seizure of a creditor of the original owner. He can seize only the equity of redemption..... *ib.*

SUCCESSIONS.

1. Where a claim against an estate is unliquidated, or the curator objects and refuses to approve it, the party may sue on it in the Court of Probates; but he cannot have execution immediately, as it must be paid concurrently with other creditors.....*Anderson's Administrator* vs. *Birdsall's Administratrix.* 441

2. Claims against estates in the course of administration, bear *legal* interest from the time they are due and payable, although unliquidated..... *ib.*

3. Where a party having two capacities, takes possession of property of a succession, and it is doubtful in which capacity he holds, the legal presumption is that he takes in the capacity the law authorizes, and that he will do what it is his duty to do.....*Selby* vs. *Bass et al.* 499

4. So where the widow causes an inventory to be made of her deceased husband's estate, and omits to put some articles in it; renounces the community, but acts as administratrix and as tutrix of her minor children; and then as executrix under a will found, and pays some debts without the order of the judge, she is not liable as intermeddler, when there is no attempt at concealment or fraud shown..... *ib.*

TAXES.

1. Oppositions to the valuation and assessment of property in the city of Lafayette must be made within the time prescribed and advertised, or they will not be listened to in court.....*Council of Lafayette* vs. *Kohn.* 94

2. The assessment roll is admissible in evidence, to show that taxes were duly assessed. If defendant objects, that it is not the true one, he should show it, and call for the right one..... *ib.*

THIRD PURCHASER.

1. A third purchaser of an estate subject to certain mortgages which he as-

PAGE

sumes to pay, cannot set up her claims in opposition to the mortgage creditor on said estate. ..... *Kenner & Co.'s Syndic* vs. *Holliday et al.* 154

2. The creditors of an estate are not bound to give security to the purchaser before coming on him for their claims due by it, on the ground that he is in danger of eviction. The right to call on a party to give security implies a warranty against eviction. ..... *ib.*

3. A third person contracting to pay the debt of another and receiving property out of which it was to be paid, cannot oppose the plea of usury, or go into the consideration of that debt, and retain the means placed in his hands to pay it. ..... *ib.*

4. Where the purchaser is actually disturbed in the possession and enjoyment of the thing sold, he can require security before the payment of the price can be demanded. ..... *Ball et al.* vs. *Le Breton et al.* 147

5. A *bona fide* purchaser, without notice, is not affected by fraud in his vendor, who has a legal title to the property sold. ..... *Blanchard* vs. *Castille.* 362

6. A third person who did not sign a notarial act of sale, although it expresses on its face that the *price* was paid, by the vendee in cash, may show by parol evidence, that in fact it was paid partly in cash, which he advanced, and by his note for the balance. ..... *Benoit* vs. *Broussard.* 387

USURY.

1. A person contracting to pay the debt of another, and receiving property out of which it was to be paid, cannot oppose the plea of usury; or go into the consideration of the debt, and retain the means placed in his hands to pay it. *Kenner & Co's Syndic* vs. *Holliday et al.* 154

2. Usurious interest which has been paid, cannot be recovered back. ..... *ib.*

3. Where A gave his note to B for $11,000 payable in 2 years, and received in payment the note of a third person endorsed by B, for $10,000 payable ten days after his own; *Held*, that it was an agreement to give and receive usurious interest and null. ..... *Flower* vs. *Millaudon.* 185

4. An agreement to take even a legal rate of interest, on a larger sum than is *really due*, is usurious. ..... *ib.*

5. So an agreement to make cash advances at 10 per cent. interest thereon, and to receive one third of the profits of the firm to which the advance was to be made, was held to be usurious. ..... *ib.*

6. Accounts which have not been objected to and received by the party, although they contain extravagant charges and usurious interest, will not be re-opened in a suit for a final settlement. Usurious interest once paid cannot be recovered back. ..... *ib.*

WARRANTY.

1. According to the provisions in articles 379, 380 and 381 of the Code of Practice, the vendee of a slave, when sued for the price, will be allowed time to cite in warranty the person to whom he sold, and who promised to pay the debt, although the plaintiff, or original vendor, never accepted him as his debtor. ..... *Brown's Executor* vs. *Copley & Jessup.* 473

PAGE

WITNESS.

1. The rule in relation to the competency of witnesses is to be governed by the *lex fori*, with some exceptions, in favor of the local law.

Buckner, Stanton & Co. vs. *Watt.* 211

2. A statute which expressly excludes the drawer of a bill from being a witness in a suit by the holder against the endorser, will not be construed to apply to the *acceptor*. This law being in derogation of the settled rules of evidence will not be extended beyond its letter..... *ib.*

3. So an acceptor who is without interest in a suit by the holder against the endorser of a bill, is a competent witness..... *ib.*

4. The guarantor of a note is a competent witness on the part of the maker, in a suit by the endorsee against the latter; for it is the interest of the witness that the plaintiff should recover, and he is called to testify against his own interest..... *Shipmans & Co.* vs. *Archinard.* 471

5. So where the plaintiffs received the note sued on *after maturity*, the defendant may produce the letter of the payees and original holders, to show that the suit is premature, *and that a certain time* had been allowed for payment. *ib.*

6. The competency of witnesses is a distinct subject of legislative enactment. It is expressly and precisely treated of by the Code, (article 2260;) and it lays down all the great and leading principles of the law of evidence.

Waters vs. *Petrovic & Blanchard.* 584

7. The article 2260 declaring who shall be a competent witness to prove any covenant or fact whatever, in civil matters, makes no exception of any particular covenant or fact whenever parol evidence is admissible under the provisions of the Code; and the act of 27th March, 1823, so far as it renders the maker of a note, &c., *an incompetent witness* in an action against the *endorser*, is *repealed*, by the last and repealing article of the Louisiana Code. *ib.*

8. The repealing act of 1828, left in force the Louisiana Code, and also the law respecting the competency of witnesses; leaving the question still open, as to the competency of makers of notes, &c., to be witnesses, &c., to be determined by the Code or act of 1823..... *ib.*

9. A notary public, who is the son of one of the endorsers on a note, is not thereby rendered incompetent to make a protest and give notice to all the parties..... *ib.*

10. A sheriff, who is the son of the plaintiff, in execution, is nevertheless competent to execute it..... *ib.*

11. So the grand-father of a legatee is a competent witness to a Will. The official act may be valid, and yet the public officer, be incompetent as a witness in any controversy growing out of the act..... *ib.*